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(17)

No. 85-1406-CFX
Status: GRANTED

Title: Donald P. Hodel, Secretary of the Interior, et al., Petitioners
v.
Village of Gambell, et al.

Docketed:
February 21, 1986

Court: United States Court of Appeals for the Ninth Circuit

Code:
85-1239

Counsel for petitioner: Solicitor General

Counsel for respondent: Cooper, Donald S.

Entry	Date	Note	Proceedings and Orders
1	Jan 9 1986		Application for extension of time to file petition and order granting same until February 22, 1986 (Rehnquist, January 13, 1986).
2	Feb 21 1986	G	Petition for writ of certiorari filed.
3	Feb 21 1986		Appendix of petitioner Hodel, Sec. of Interior filed.
5	Mar 19 1986		Order extending time to file response to petition until April 30, 1986.
6	Mar 3 1986		Brief amicus curiae of Resource Development Council for Alaska, Inc., et al. filed. VIDED.
7	Apr 24 1986		Brief amicus curiae of State of California filed.
8	May 5 1986		Brief of respondents Village of Gambell, et al. in opposition filed. VIDED.
9	May 13 1986		DISTRIBUTED. May 29, 1986
10	May 5 1986	X	Reply brief of petitioner Hodel, Sec. of Interior filed.
11	Jun 2 1986		Petition GRANTED. The case is consolicated with 85-1239, and a total of one hour is allotted for oral argument. **********
13	Jul 11 1986		Order extending time to file brief of petitioner on the merits until July 31, 1986.
14	Jul 28 1986		Record filed.
15	Jul 29 1986		Joint appendix filed. VIDED.
16	Jul 29 1986		Brief amicus curiae of Resource Development Council for Alaska, et al. filed. VIDED.
17	Jul 31 1986		Brief of petitioners Donald P. Hodel, et al. filed. VIDED.
18	Aug 12 1986		Lodging filed in 85-1239.
20	Aug 18 1986		Order extending time to file brief of respondent on the merits until October 3, 1986.
21	Aug 22 1986	G	Motion of the Solicitor General for divided argument filed.
22	Sep 17 1986		Application of respondents for leave to file a brief on the merits in excess of the page limitation filed (A-216), and order denying same by Rehnquist, J., on September 19, 1986.
24	Oct 6 1986		Motion of the Solicitor General for divided argument GRANTED. Justice Scalia OUT.
25	Sep 29 1986		Order further extending time to file brief of respondent on the merits until October 8, 1986.
26	Sep 30 1986		Brief amicus curiae of California, et al. filed. VIDED.
27	Oct 2 1986		Brief amicus curiae of Natural Resources Defense Council, et

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• 85-1406-CFX

try	Date	Note	Proceedings and Orders
			al. filed. VIDED.
9	Oct 3 1986		Brief of respondents Village of Gambell, et al. filed. VIDED.
9	Oct 3 1986		Brief amicus curiae of North Slope Borough filed. VIDED.
0	Oct 2 1986		Brief amicus curiae of Alaska filed. VIDED.
1	Oct 22 1986		CIRCULATED.
2	Nov 14 1986		SET FOR ARGUMENT. Monday, January 12, 1987. This case is consolidated with No. 85-1239. (1st case) (1 hour).
3	Dec 30 1986	X	Reply brief of petitioner Hodel, Sec. of Interior filed. VIDED.
4	Jan 12 1987		ARGUED.

85 No 1406

Supreme Court, U.S.
FILED
FEB 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's rule that a district court must enter a preliminary injunction whenever it finds a likely violation of an environmental statute, unless the injunction itself would cause environmental harm, conflicts with *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), and decisions from other circuits that require a balancing of the equities.

2. Whether Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3120, which requires federal land managers to determine whether proposed dispositions of public lands in Alaska "would significantly restrict subsistence uses" and, if so, to follow certain procedures and make certain findings prior to any such disposition, applies to the outer continental shelf (OCS), when the Act defines "public lands" as lands "the title to which is in the United States" and which are "in Alaska."

3. Whether the court of appeals' ruling that neither OCS leasing nor exploration may proceed until the Secretary of the Interior complies with Section 810's procedural requirements for all stages of the OCS program, including development and production, conflicts with *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984).

4. Whether the court of appeals' decision applying ANILCA to the OCS should be given retroactive effect, thereby casting a cloud over more than 600 previously-issued OCS leases and $4.2 billion in bonus bids received by the Treasury for those leases.

PARTIES TO THE PROCEEDING

The petitioners are Donald P. Hodel, Secretary of the Interior, and the United States Department of the Interior. The respondents are:

People of the Village of Gambell
People of the Village of Stebbins
Nunam Kitlutsisti
Amoco Productions Company
ARCO Alaska, Inc.
Exxon Corporation
Mobil Exploration & Producing Services, Inc.
Sohio Alaska Petroleum Company
Shell Western E & P, Inc.
Texaco, Inc.
Union Oil Company of California

The oil company respondents have filed their own petition for a writ of certiorari (No. 85-1239 (filed Jan. 22, 1986)), seeking review of the same judgment addressed in this petition.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior and the United States Department of the Interior, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-34a) is reported at 774 F.2d 1414. The opinion of the district court (App. 35a-43a) is unreported. An earlier opinion of the court of appeals in this case (App. 44a-67a) is reported at 746 F.2d 572. An earlier opinion of the district court (App. 68a-69a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. 79a-80a) was entered on October 25, 1985. On January 13, 1986, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including February 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3101 *et seq.*, are set forth in the appendix to this petition at 116a-122a.

STATEMENT

This case concerns exploratory drilling by lessees of the federal government in two outer continental shelf (OCS) leasing areas in the Bering Sea. The OCS off Alaska is more than twice as large as the entire OCS off the 48 contiguous states and is of critical importance to the Department of the Interior's efforts to implement the policy of the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLA), 43 U.S.C. 1331 *et seq.*, " 'to promote the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the [OCS].' " *Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 154 n.2 (1981) (quoting H.R. Rep. 95-590, 95th Cong., 1st Sess. 53 (1977)); see also 43 U.S.C. 1332(3), 1802(1) and (9). The areas involved in this case are Norton Sound (Lease Sale 57) and the Navarin Basin (Lease Sale 83). A divided panel of the court of appeals reversed the district court's denial of a preliminary injunction against exploratory activities in these two areas on the ground that respondents' showing of a likelihood of success on their claim that the Secretary of the Interior violated Section 810 of ANILCA, 16 U.S.C. 3120, *required* the issuance of an injunction, notwithstanding the countervailing equities and public interest considerations that led the district court to deny injunctive relief.

1. *The challenge to Lease Sale 57 (Norton Sound).* – Lease Sale 57, which took place in March 1983, was preceded by intensive study of possible environmental

impacts, including impacts on subsistence uses.[1] The environmental impact statement (EIS) for Lease Sale 57 gave considerable attention to possible impacts on subsistence uses (EIS 47-55, 136-148, 204, 206, 211-213, 223-224, 291-296) and concluded that significant disruption of subsistence uses from all phases of OCS operations was "unlikely" (*id.* at 142). However, the specific procedures of Section 810 of ANILCA, relating to dispositions of public lands that "would significantly restrict subsistence uses," were not followed, because Interior was of the view that ANILCA, which applies only to public lands "situated in Alaska," the "title to which is in the United States," 16 U.S.C. 3102(2) and (3), does not apply to the OCS.

The native villages of Gambell and Stebbins filed a complaint on March 4, 1983, seeking injunctive relief against Lease Sale 57. The complaint charged that the Secretary had failed to comply with Section 810 and that the sale conflicted with the villagers' alleged aboriginal rights to the OCS. The district court denied the villages' motion for a preliminary injunction, and the sale was held on March 15, 1983. On April 4, 1983, the district court denied the villages' motion for summary judgment, holding that there was "no persuasive evidence that Congress intended the phrase 'public lands', as used in § 810(a), should include offshore lands and waters outside the territorial boundaries of Alaska" (App. 69a). The court also held that the villagers had no aboriginal rights to the OCS (*ibid.*). Based on these rulings, the district court granted summary judg-

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[1] The term "subsistence uses" is defined in Section 803 of ANILCA, 16 U.S.C. 3113, as "the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade."

ment in favor of the government and the intervenor oil companies. The villages appealed and moved in the Ninth Circuit to enjoin the issuance of leases pending appeal. That motion was denied by a panel of the court of appeals on May 10, 1983. On that same day, 59 tracts were leased for bonus payments totalling $317,873,372.

2. *Approval of exploration plans for Norton Sound.*—Subsequent to the district court's ruling, but prior to the court of appeals' decision on the merits of the villages' appeal, intervenors Exxon and ARCO (petitioners in No. 85-1239) submitted exploration plans covering a number of the tracts in Norton Sound on which they had received leases. Exploration is the third of the "four distinct statutory stages to developing an offshore oil well" created by the 1978 amendments to the OCSLA. *Secretary of the Interior* v. *California*, 464 U.S. 312, 337 (1984).[2] Exploration may proceed only after the lessees demonstrate compliance with any applicable state management program under the Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.*, and that the proposed activities probably will not " 'cause serious harm or damage . . . to the marine, coastal, or human environment . . . .' " *Secretary of the Interior* v. *California*, 464 U.S. at 339 (quoting 43 U.S.C. 1334(a)(2)(A)(i) and 1340(c)(1)). The Secretary's approval of an exploration plan is reviewable only in the court of appeals for the circuit in which the affected state is located, and any challenge must be filed within 60 days of the approval. 43 U.S.C. 1349(c)(2) and (3). Exxon's exploration plan was approved by the Secretary on December 28, 1983, and ARCO's plan was approved on March 19, 1984. Neither the villages nor anyone else challenged the Secretary's

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[2] The four stages of the OCS process are: (1) planning a five-year nationwide leasing program (43 U.S.C. 1344); (2) conducting a lease sale (43 U.S.C. 1337(a)); (3) exploration (43 U.S.C. 1340); and (4) development and production (43 U.S.C. 1351).

approval of the exploration plans within the 60-day period provided by 43 U.S.C. 1349(c). Accordingly, exploration proceeded in Norton Sound during the summer of 1984 with the drilling of four wells.

3. *The Court of Appeals' decision in Gambell I.*—On November 2, 1984, the court of appeals affirmed the district court's rejection of the villagers' aboriginal title claim, but reversed the district court's holding that Section 810 of ANILCA does not apply to the OCS. *People of the Village of Gambell* v. *Clark* (*Gambell I*), 746 F.2d 572 (9th Cir. 1984) (App. 44a-65a). The court of appeals did not reach the question whether Interior had substantially complied with Section 810 in the course of complying with other environmental statutes or, if not, whether the Sale 57 leases should be voided. Instead, the court remanded the case to the district court for a determination of these issues and the framing of an appropriate remedy (App. 65a).

4. *Interior's post*-Gambell I *subsistence evaluation for Lease Sale 57.*—In accordance with the Ninth Circuit's decision in *Gambell I,* Interior began to integrate the requirements of Section 810 into its Alaska OCS leasing program. Section 810 imposes a two-step procedure on federal land managers in Alaska whenever they propose to "withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands" (16 U.S.C. 3120(a)). Section 810(a) first requires the land manager to "evaluate": (1) the effect of the proposal on subsistence uses and needs; (2) the availability of other lands for the purposes sought to be achieved; and (3) other alternatives that would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. If this evaluation reveals that the proposed action "would significantly restrict subsistence uses," the land manager must engage in additional procedures set forth in Section 810(a)(1) through (3). These procedures include notice, a hearing, and the making of specified findings.

With respect to Lease Sale 57, Interior determined to re-evaluate subsistence issues, including those already studied in the EIS for the sale. Interior's post-sale Section 810 evaluation was issued on April 22, 1985 (App. 81a-106a). The evaluation document followed the stage-by-stage approach set out in the OCSLA, noting that a Section 810 evaluation for a lease sale need consider only the effects on subsistence uses of the lease sale itself and not the effects of exploration or development and production (App. 84a). See generally *Secretary of the Interior* v. *California*, 464 U.S. at 337-341. The evaluation document nonetheless analyzed, to the extent feasible, possible impacts that might arise at those future stages of the OCS process (App. 84a).

Insofar as the lease sale itself was concerned, the evaluation document found that the execution of leases (which permits lessees to conduct only limited preliminary activities on the OCS) had not and would not significantly restrict subsistence uses (App. 103a). The evaluation document further found that the exploration stage activities that had occurred in Norton Sound to date had not significantly restricted subsistence uses and were not likely to do so in the future (App. 103a, 106a). (The evaluation document noted that a separate Section 810 evaluation would be performed for each subsequent exploration plan submitted for the Secretary's approval (App. 85a).) Finally, the evaluation document found that, if development and production activities were ever proposed in the Lease Sale 57 area, they might, in the event of a major oil spill, significantly restrict subsistence uses for limited periods in limited areas (App. 92a-99a). The evaluation document stressed that more definitive judgments could be made only if and when a particular development and production plan were submitted for approval and that a separate Section 810 evaluation would be prepared at that time (App. 85a).

5. *Lease Sale 83 (Navarin Basin).*—Lease Sale 83 was conducted on April 17, 1984, without litigation challenge and resulted in the leasing of 163 tracts for total bonus payments of $516,317,331.[3] The Navarin Basin is so far from land—more than 250 miles from the nearest inhabited land (St. Lawrence Island) and more than 350 miles from the mainland—that no Native subsistence harvesting occurs there. Nevertheless, the possible subsistence effects of Lease Sale 83 were examined in the lease sale EIS (EIS IV-20 to IV-68, III-60 to III-75, IV-81 to IV-90, IV-106, IV-112) and found to be negligible (*id.* at IV-83 to IV-84).

Interior approved exploration plans for the Navarin Basin on December 28, 1984 (Exxon), January 23, 1985 (ARCO), and April 19, 1985 (Amoco). These approvals were made after the court of appeals' ruling in *Gambell I* and accordingly contained explicit Section 810 evaluations. See, *e.g.*, App. 107a-115a (Section 810 evaluation for Exxon's exploration plan). No challenges to these approvals were brought within the 60-day period provided in 43 U.S.C. 1349(c)(3)(C). In reliance on the approvals, the three companies proceeded to commit more than $60 million in preparation for the 1985 drilling season.

6. *Proceedings on remand in the district court.*—On April 3, 1985, the villages returned to the district court seeking a preliminary injunction against exploratory activities in the Lease Sale 57 area. By that time, intervenor Exxon had committed more than $10 million toward the drilling of two exploratory wells in Norton Sound during the ice-free months of 1985.

On April 23, 1985, more than a year after Sale 83 had been held, the Village of Gambell, joined by Nunam Kitlutsisti, an organization of Yukon Delta Natives, filed

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[3] High bids of $108,174,000 were received on tracts that are claimed by both the United States and the Soviet Union. The money received for those tracts is being held in escrow pending discussions between the two nations.

a complaint seeking to void Lease Sale 83 and enjoin imminent exploratory drilling in the Navarin Basin. The Lease Sale 83 complaint, like that in the Lease Sale 57 litigation, alleged violations of Section 810 and also added a claim that the Secretary, by conducting the lease sale, had breached trust duties owed to the Natives.

After consolidating the requests for preliminary injunctions in the Sale 57 and Sale 83 cases, the district court denied the motions on May 23, 1985 (App. 35a-43a). The court found that the villages had "established a strong likelihood of success on the merits" (App. 43a). Specifically, the court reasoned that even though the Secretary's environmental impact statements for both sales had included the type of evaluation of subsistence impacts called for by Section 810, those evaluations were necessarily deficient because the Secretary "did not have the policy precepts of ANILCA in mind at the time of evaluation" (App. 37a-38a). The court went on to examine Interior's post-sale ANILCA compliance document for Lease Sale 57 (see page 6, *supra*). The court did not question that this document adequately evaluated the effects of leasing on subsistence uses, nor did it question Interior's conclusion that neither the leasing nor the exploration stage of the OCS process would significantly restrict subsistence uses. However, the court concluded that the notice, hearing, and findings requirements of Section 810(a)(1)-(3) should have been followed, in light of Interior's determination that a significant restriction on subsistence uses might occur at the development and production stage, should that stage ever be reached (App. 40a-41a).

The district court nevertheless concluded for several reasons that the equities weighed against the issuance of an injunction prohibiting continued exploratory activities. First, the OCSLA gives the Secretary continuing power to control and shape the offshore leasing process; hence, if compliance with the requirements of Section 810 reveals a

need to alter leasing conditions or configurations, the Secretary retains the power to do so (App. 43a). Second, it was apparent that the only activity planned at this time, exploration, would not significantly restrict subsistence uses (*ibid.*). Third, the national interest in expedited OCS exploration declared in 43 U.S.C. 1332(3) would be frustrated by an injunction (App. 43a).

7. *The court of appeals' decision in* Gambell II. – The villages took an appeal from the district court's denial of injunctive relief and sought an emergency injunction against the ongoing exploratory drilling in the two sale areas. On June 6, 1985, a panel of the court of appeals denied the motion, but directed the Secretary, in conjunction with the intervenor oil companies, to file a "hold harmless agreement that will protect [the villages] from any consequences resulting from significant restrictions upon subsistence uses by [the villages] of their lands" (App. 70a). A hold harmless agreement was submitted to the court of appeals on June 13, 1985 (App. 72a-76a) and approved by the court, with minor revisions, on June 21, 1985 (App. 77a-78a).

Exploratory drilling proceeded without incident in both sale areas throughout the summer and fall of 1985. On October 25, 1985, a divided panel of the court of appeals issued the decision here sought to be reviewed, in which it reversed the district court's denial of preliminary injunctive relief (*Gambell II*, App. 1a-34a). The court of appeals affirmed the district court's ruling that the villages had established a strong likelihood of success on the merits, agreeing with the lower court that the Secretary could not have substantially complied with Section 810 of ANILCA because he did not have its mandate clearly in mind when he decided to conduct the lease sales (App. 8a-12a).[4]

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[4] Inexplicably, the court of appeals stated (App. 9a) that "in determining whether to approve Lease Sale 57 or Lease Sale 83, the Secretary did not evaluate the effect of such leases on subsistence uses

Turning to the post-sale Section 810 evaluation for Lease Sale 57 (see page 6, *supra*), the court of appeals agreed with the district court that Interior's finding that development and production activities, if they ever occur, "may significantly restrict subsistence uses in certain areas" (App. 85a) required the Secretary to conduct the hearing and make the findings required by Section 810(a)(1)-(3) prior to conducting the lease sales. The court distinguished *Secretary of the Interior* v. *California, supra*, on the ground that that decision did not deal with ANILCA (App. 13a).

The court of appeals next held that the equitable considerations relied upon by the district court in denying a preliminary injunction did not "excuse its duty to issue an injunction in light of its determination that there was a strong likelihood that the Villages would prevail [on the merits]" (App. 15a). The court of appeals did not disagree with the district court's finding that "exploration will not significantly restrict subsistence resources" (*ibid.*). Instead, the court ruled that " '[i]rreparable damage is presumed' " whenever an agency has failed to comply with an environmental statute. App. 15a (quoting *Save Our Ecosystems* v. *Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984)). Under this essentially irrebutable presumption, an injunction *must* issue whenever a court finds "a substantive procedural violation of an environmental statute" (or preliminarily finds it likely that such a violation has occurred), save in "unusual circumstances" (App. 15a, 19a). The court of appeals limited "unusual circumstances" to situations in which enjoining a project from proceeding in likely violation of an environmental statute would cause

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and needs of the Native Alaskans," even though the district court had found the opposite, relying on a record that clearly showed that the Secretary had performed detailed subsistence evaluations in the environmental impact statements prepared for the two sales (App. 37a, 41a-42a).

more environmental harm than good (App. 17a) or would interfere with certain types of long-term contracts (App. 16a, 19a). In this case, the court of appeals held that the district court erred by finding "unusual circumstances" in the harm an injunction would cause to the national interest in expedited OCS development and in the ability of the Secretary to alter the configuration of OCS activities if ANILCA subsistence studies show that to be necessary at any future stage of exploration or development (App. 16a, 19a).

The court of appeals rejected the district court's findings with respect to the public interest, which were bottomed on the policy declared by Congress in the OCSLA to expedite exploration of the OCS. The court concluded that ANILCA effectively superseded this congressional policy. App. 20a-21a. Finally, the court rejected arguments that it was improper to apply *Gambell I* retroactively to Lease Sale 83 (App. 22a-25a) and that the villages' challenge to Lease Sale 83 was barred by laches (App. 25a-26a).

District Judge Dimmick, sitting by designation, dissented (App. 28a-34a). She noted that the government and the oil company intervenors "presented the trial court with substantial evidence showing that it was highly unlikely that exploratory activities would adversely affect subsistence resources," as well as evidence that the oil companies would have lost up to $70 million if the preliminary injunction had been granted (App. 30a). In contrast, the villages had presented only evidence of "speculative harm" (*ibid.*). The dissent explained (App. 29a) that the majority's "rigid approach to the issuance of an injunction" was contrary to *Weinberger* v. *Romero-Barcelo,* 456 U.S. 305 (1982). The dissent also disagreed (App. 31a-32a) with the majority's retroactive application of *Gambell I* to Lease Sale 83.

REASONS FOR GRANTING THE PETITION

The decision below poses a serious threat to the congressionally-mandated OCS leasing program and, more broadly, to all federal programs challenged on environmental grounds in the Ninth Circuit. The immediate effect of the decision is to halt exploratory drilling in two basins off Alaska and throw into doubt the ability of lessees on hundreds of other OCS tracts off Alaska to carry out exploration activities (see pages 20-21, *infra*). More generally, the Ninth Circuit's rule that a showing of a likelihood of success on the merits of a claim that an environmental statute has been violated *requires* the issuance of a preliminary injunction without any consideration of the competing equities or, indeed, any showing that the requested injunction will serve any purpose in remedying the statutory violation claimed clearly portends significant disruptions of federal programs and projects throughout the large portion of the country under the jurisdiction of the Ninth Circuit. The court's unprecedented per se injunction rule is directly contrary to this Court's decision in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), as well as numerous decisions from other circuits, and it requires correction by this Court.

Of equal concern is the court of appeals' unwarranted extension of ANILCA to the OCS and its interpretation of Section 810 of that Act as requiring consideration even before a lease sale is held of subsistence impacts that might or might not occur at future stages of the OCS process. As this Court recognized in *Secretary of the Interior* v. *California*, 464 U.S. 312, 341 (1984), the premature litigation that such a ruling will generate was precisely what Congress intended to preclude when it divided the OCS process into four distinct stages and provided the

Secretary with full authority to control lessees' activities at each stage. Accordingly, review by this Court is warranted.[5]

1. a. In *Romero-Barcelo*, the First Circuit had ruled that the district court was *required* to issue a permanent injunction upon finding that the Navy was in violation of the Clean Water Act and that the district court "erred in undertaking a traditional balancing of the parties' competing interests" (456 U.S. at 311). This Court reversed (*ibid.*). In the course of its opinion, the Court thoroughly reviewed the basic principles of equity jurisprudence in the federal courts. Starting with the proposition that an injunction " 'is not a remedy which issues as of course' " (456 U.S. at 311 (quoting *Harrisonville* v. *W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-338 (1933)), the Court stated that the foundation for "injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies" (456 U.S. at 312). Moreover, balancing of the equities is essential: "Where plaintiff and defendant present competing claims of injury, the traditional function of equity has been to arrive at a 'nice adjustment and reconciliation' between the competing claims" (456 U.S. at 312 (quoting *Hecht Co.* v. Bowles, 321 U.S. 321, 329 (1944)). " 'The essence of equity jurisdiction,' " the Court stated, is "to mould each decree

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[5] It is extremely unlikely that a conflict among the circuits will develop on the ANILCA issues, because that Act affects only Alaska. Although potential plaintiffs theoretically could bring suit in the District of Columbia, they obviously are unlikely to do so in light of the expansive view of the statute already taken by the Ninth Circuit.

We also note that the Ninth Circuit's construction of the statute, although rendered in the context of an appeal from the denial of preliminary relief, effectively represents the court of appeals' final conclusions on the merits of the ANILCA issues. Accordingly, in light of the deleterious consequences of the court's erroneous interpretation, review is warranted at this time.

to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.' " *Ibid.* Finally, the Court specified that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction" (456 U.S. at 312).

These principles apply with even greater force when the question is whether to grant a preliminary injunction. The court will not have had an opportunity fully to consider the merits of the case, thereby making the sole justification for the exercise of equitable power the maintenance of the status quo pending completion of the litigation. Cf. *Scripps-Howard Radio, Inc.* v. FCC, 316 U.S. 4, 9-11 (1942). Accordingly, the plaintiff must demonstrate that, in the absence of a preliminary injunction, it will suffer actual and substantial injury that is truly irreparable, *i.e.*, incapable of remedy by relief ordered at the termination of the litigation. See *Sampson* v. *Murray*, 415 U.S. 61, 90 (1974). Moreover, the court must consider the injury to the defendants and the public interest that would be occasioned by the entry of even a temporary injunction. See, *e.g.*, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). In an appropriate case, irreparable damage to the public interest will justify withholding preliminary relief even though the burden on the plaintiff is substantial. *Yakus* v. *United States*, 321 U.S. 414, 440-441 (1944). Taken together, these considerations constitute the familiar four-part test that traditionally has governed the issuance of preliminary injunctions, stays, and other forms of temporary equitable relief in the federal courts. See, *e.g.*, *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), cited in *Sampson* v. *Murray*, 415 U.S. at 84.[6]

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[6] In *Virginia Petroleum Jobbers*, 259 F.2d at 925, the court articulated the test as follows: (1) Whether the petitioner has made a strong showing that it is likely to prevail on the merits; (2) whether the petitioner has shown that without such relief, it will be irreparably injured; (3) whether the issuance of a stay would substantially harm

The Ninth Circuit has rejected these well established principles governing the exercise of equitable power by federal courts in favor of a rule that inflexibly requires a court to enter the injunction requested by the plaintiffs whenever it finds a violation, or probable violation, of an environmental statute (App. 14a-19a).[7] The unwarranted

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other parties; and (4) whether injunctive relief would be in the public interest.

In recent years, several lower federal courts, including the Ninth Circuit, have adopted an "alternative" test that requires a less convincing showing of success on the merits if the balance of irreparable injury tilts decidedly in favor of the applicant for preliminary relief. See, *e.g.*, *Wm. Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 526 F.2d 86 (9th Cir. 1975). In the Ninth Circuit, either test is "satisfactory." *Benda* v. *Grand Lodge of IAM*, 584 F.2d 308, 315 (1978), cert. dismissed, 441 U.S. 937 (1979).

The Ninth Circuit recently combined the alternative test for preliminary relief with its per se injunction rule for alleged violations of environmental statutes in a manner that would seem to entitle any plaintiff with a non-frivolous complaint to the automatic issuance of a preliminary injunction. In *Tenakee Springs* v. *Block*, 778 F.2d 1402 (1985), petition for reh'g pending, the court found that the presence of "serious questions" concerning compliance with the National Environmental Policy Act was sufficient to invoke the rule that "irreparable injury may be presumed when [a] NEPA violation is found" (778 F.2d at 1407) and ordered the district court to issue a preliminary injunction (*id.* at 1408). This suggests that district courts in the Ninth Circuit are now required to enter preliminary injunctions against federal programs or projects even if the plaintiffs have done no more than raise a "serious question" concerning compliance with an environmental statute.

[7] As noted (see pages 10-11, *supra*), the Ninth Circuit's rule admits of only two exceptions. An injunction may be denied if injunctive relief would itself cause irreparable harm to the environment or if such relief would interfere with certain types of long-term contracts (App. 16a, 19a). The contractual-interference exception is evidently quite narrow, because the court of appeals did not apply it in this case despite the fact that the injunction against exploratory operations interferes with the intervenor oil companies' right to explore their leases pursuant to their contracts with the government and their approved exploration plans.

consequences of the Ninth Circuit's rigid approach to injunctive relief in environmental suits are well illustrated by this case. The asserted violations of ANILCA that triggered the per se injunction rule were perceived deficiencies in Interior's consideration of subsistence impacts at the time the Secretary decided to conduct Lease Sale 57 and Lease Sale 83.[8] Yet, in ordering that "all activities in connection with Lease Sale 57 and Lease Sale 83" be enjoined (App. 27a), the court of appeals gave no consideration to the fact that, at the present time, the only activities in the two sale areas are exploratory operations. The court of appeals' failure to focus on this fact renders the injunction ordered by the court indefensible. Interior made explicit findings that exploration would not significantly restrict subsistence resources in the two sale areas (see App. 85a, 90a, 92a, 95a, 98a, 99a, 101a, 103a, 106a, 108a-115a), and those findings have not been challenged by the villages or questioned by either court below. Indeed, the district court explicitly found that the injury that Section 810 was intended to prevent—significant restrictions on subsistence uses—was highly unlikely to result from exploration activities (App. 43a). In these circumstances, it is difficult to perceive what role the injunction mandated by the court of appeals will play in preventing irreparable injury to the

[8] We note that the asserted violations in this case were plainly insubstantial. In the Lease Sale 83 case, for example, the district court found that the Secretary had "considered the relevant factors" required by Section 810 and had not erred in finding that the lease sale and subsequent stages of the OCS process, including development and production, would have "negligible" or "nonexistent" impacts on subsistence uses (App. 41a-42a). Nevertheless, the district court and the court of appeals found a violation of Section 810 solely because the Secretary made his subsistence findings pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, rather than Section 810 of ANILCA, and thus did not have the policy precepts of Section 810 "clearly in mind" (App. 8a, 38a).

villages during the pendency of this case or in curing any asserted violation of ANILCA associated with the lease sales. Cf. *Kleppe* v. *Sierra Club*, 427 U.S. 390, 407-408 & n.16 (1976).

On the other hand, as the district court found (App. 43a), an injunction against exploratory activities causes irreparable harm to the congressionally-mandated goal of expedited exploration and development of the OCS. See 43 U.S.C. 1802(1) and (9). As the dissent further recognized (App. 30a), an injunction at the beginning of the 1985 season would have caused huge unrecoverable monetary losses to the intervenor oil companies, whose expenditures were made in reliance upon the Secretary's unchallenged approvals of their exploration plans. In sum, the application of the per se injunction rule in this case has led to a requirement of injunctive relief that serves no purpose other than the infliction of harm to the public and private interests involved.

The court of appeals' automatic injunction rule cannot be squared with *Romero-Barcelo*. The court was simply wrong in asserting (App. 23a n.2) that the "injunctive relief we grant is the only means of insuring compliance under section 810." Even if we assume that Section 810 applies to the OCS at all (but see pages 20-25, *infra*), an order directing Interior to come into compliance with that Section would be at least as effective as the order issued by the district court in *Romero-Barcelo*, which merely directed the Navy to apply for a discharge permit under the Clean Water Act (see 456 U.S. at 309-310).

The court of appeals also erred in concluding (App. 23a n.2) that *TVA* v. *Hill*, 437 U.S. 153 (1978), rather than *Romero-Barcelo*, governs this case. As the Court made clear in *Romero-Barcelo*, 456 U.S. at 313, *Hill* involved a situation in which "Congress had foreclosed the exercise of the usual discretion possessed by a court of equity." The Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, at issue in *Hill*, expressly barred any federal action that

would destroy a critical habitat, and it was undisputed that closing the gates of the Tellico Dam would have done just that (*Hill*, 437 U.S. at 173-174). Unlike the provision of the ESA at issue in *Hill*, however, Section 810 of ANILCA is purely procedural. See *Kunaknana* v. *Clark*, 742 F.2d 1145, 1150 (9th Cir. 1984). Rather than forbidding any interference with subsistence uses, Section 810 expressly permits a federal action that *will* restrict subsistence uses to go forward so long as the procedural requirements of the Section have been satisfied (see Section 810(d) of ANILCA, 16 U.S.C. 3120(d); App. 64a).[9] Furthermore, the district court found that exploration "will not significantly restrict subsistence resources" (App. 43a), and the court of appeals did not disturb that finding. Hence, *Hill* is inapplicable to this case, and the general rules of equity jurisprudence, as set forth in *Romero-Barcelo*, apply with full force.

Finally, the court of appeals' attempt (App. 23a n.2) to distinguish *Romero-Barcelo* on the basis that it involved a permanent rather than a preliminary injunction is totally unconvincing. Indeed, that distinction cuts the other way, because, at the preliminary injunction stage, the parties have not had a full opportunity to present their arguments and the primary concern of the court is to preserve the status quo. See *University of Texas* v. *Camenisch*, 451 U.S. 390, 395-396 (1981). Clearly, there is no rational

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[9] Thus, there is no support for the court of appeals' statement (App. 23a n.2) that "in enacting section 810, Congress has chosen the protection of subsistence life over oil exploration." Congress merely intended to integrate subsistence considerations into public land management planning decisions. As the Senate Report on ANILCA stated, "once the requirements of [Section 810] are satisfied and incorporated into existing land use planning processes the proposed action may proceed even though its effect may be adverse to subsistence uses." S. Rep. 96-413, 96th Cong., 1st Sess. 234 (1979).

basis for giving a district court less rather than more discretion and flexibility when considering whether to grant preliminary relief.

b. The ruling below conflicts with decisions from numerous other circuits. The court of appeals acknowledged (App. 16a) that "the D.C. Circuit Court apparently does not follow the Ninth Circuit rule that injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances." Indeed, in *Alaska* v. *Andrus*, 580 F.2d 465, 485-486 (D.C. Cir.), vacated in part on other grounds as moot *sub nom. Western Oil & Gas Ass'n* v. *Alaska*, 439 U.S. 922 (1978), the court refused to void OCS leases and enjoin exploration, despite NEPA violations, noting that exploration posed a "risk [that] is simply too small and too speculative to justify the imposition of an injunction * * *." In *Wisconsin* v. *Weinberger*, 745 F.2d 412, 425-426 (7th Cir. 1984), the court of appeals reversed the grant of an injunction premised on NEPA violations, holding that a "presumption of harm" analysis similar to that employed by the Ninth Circuit was contrary to *Romero-Barcelo* and "[t]he recent trend of the majority of courts * * *." Indeed, there appears to be no other circuit that follows the Ninth Circuit's per se injunction rule. See *Massachusetts* v. *Watt*, 716 F.2d 946, 952 (1st Cir. 1983) (emphasis in original) ("This is not to say that a likely NEPA violation automatically calls for an injunction; the *balance* of harms may point the other way."); *United States* v. *Lambert*, 695 F.2d 536, 539-540 (11th Cir. 1983) (government not entitled to preliminary injunction despite showing of probable violation of Clean Water Act); *Sierra Club* v. *Hennessy*, 695 F.2d 643, 648-649 (2d Cir. 1982) ("A violation of NEPA does not necessarily require a reflexive resort to the drastic remedy of an injunction."); *Environmental Defense Fund* v. *Marsh*, 651 F.2d 983, 1005-1006 (5th Cir.

1981); *Minnesota Public Interest Research Group* v. *Butz*, 498 F.2d 1314, 1323 (8th Cir. 1974); *Ohio ex rel. Brown* v. *Callaway*, 497 F.2d 1235, 1240 (6th Cir. 1974).

The Ninth Circuit, on the other hand, has taken to applying its per se rule with increasing frequency. See, *e.g.*, *Tenakee Springs* v. *Block*, 778 F.2d 1402, 1407-1408 (1985); *Steamboaters* v. *FERC*, 777 F.2d 1384 (1985); *Thomas* v. *Peterson*, 753 F.2d 754, 764 (1985); *Save Our Ecosystems* v. *Clark*, 747 F.2d 1240, 1250 (1984). The rule presents a serious and continuing problem for countless federal projects and programs and is so far divorced from the equitable inquiry required by *Romero-Barcelo* and followed by the other circuits that certiorari is warranted.[10]

2. As we shall show (see pages 22-25, *infra*), Congress never intended ANILCA to apply to the OCS. The Ninth Circuit's contrary ruling raises several issues of grave importance for the OCS program. *Gambell I* extended this public lands statute to the OCS on the theory that the "ambiguous language" defining the Act's scope should be construed in favor of Natives, who, along with other rural residents of Alaska, are the beneficiaries of the legislation (App. 62a-64a). This ruling has a number of bizarre consequences, including the possibility of state jurisdiction over the fish and wildlife of the OCS, an area of exclusive federal jurisdiction. Compare App. 64a n.9 with *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 479-480 n.7 (1981). *Gambell II* goes further, by extending the reach of the Act to an area so far from land (the Navarin Basin) that it is not even used for Native subsistence purposes.

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[10] Subsequent to the court of appeals' decision in this case, yet another OCS sale off Alaska has been preliminarily enjoined, based on the district court's conclusion that Ninth Circuit precedent left the court "without discretion" to deny injunctive relief once the plaintiffs had shown a likelihood of success on the merits. *Tribal Village of Akutan* v. *Hodel*, No. A85-701 (D. Alaska Jan. 13, 1986), slip op. 4, appeal pending, No. 86-3512 (9th Cir.). See also note 14, *infra*.

Gambell II rules that *Gambell I* will be applied retroactively and at the same time forbids any argument that pre-*Gambell I* subsistence studies performed under other statutes may have fulfilled the purposes of Section 810. Taken together with the rejection of the government's laches defense (App. 25a-26a), these rulings put at grave risk the 621 leases issued offshore Alaska since the enactment of ANILCA on December 2, 1980, and threaten the loss of over $4.2 billion in bonuses received for those leases. In addition, by rejecting without discussion the government's argument that exploration activities conducted pursuant to approved exploration plans may not be challenged outside the 60-day review period provided by 43 U.S.C. 1349(c)(3), *Gambell II* upsets the carefully limited judicial review procedures of the OCSLA for this stage of the OCS process (see page 4, *supra*) and threatens to disrupt exploration under the 26 exploration plans currently in effect on the OCS offshore Alaska.

The prospective effect of *Gambell I* and *II* is equally serious. It is clear that the only stage of the OCS process at which there might ever be significant restrictions on subsistence uses is the development and production stage (see App. 43a). Yet *Gambell II* rules that the likelihood of a significant restriction on subsistence uses at that stage requires Interior to determine at the leasing stage that development and production "will involve the minimal amount of public lands necessary to accomplish the purposes of such * * * disposition" and that "reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources * * *." 16 U.S.C. 3120(a)(3)(B) and (C). But it is impossible, before knowing whether and where recoverable resources exist and how lessees propose to develop them, to make any informed judgment regarding the minimal amount of land necessary for OCS development and how best to minimize production stage impacts.

The net effect of the court of appeals' ruling is to encourage litigation at the lease sale stage over impacts that will flow, if at all, only from the development and production stage. See, *e.g.*, *Tribal Village of Akutan* v. *Hodel*, No. A85-701 (D. Alaska Jan. 13, 1986), appeal pending, No. 86-3512 (9th Cir.). But such litigation is precisely what Congress sought to preclude when it divided the OCS process into discrete stages. *Secretary of the Interior* v. *California*, 464 U.S. at 341. In light of the significant burdens that the court of appeals' decision will place on the OCS program, this Court should reverse the Ninth Circuit's unwarranted seaward extension of ANILCA.[11]

a. Section 810 applies only to the disposition of "public lands." By itself, that phrase does not in the least suggest application to the OCS. See, *e.g.*, *Mann* v. *Tacoma Land Co.*, 153 U.S. 273, 284 (1894) (tidelands are not "public lands"); *Bardon* v. *Northern Pacific R.R.*, 145 U.S. 535, 538 (1892) ("by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws"). The OCS, of course, has never been open to sale or disposition under the general land laws. In *Justheim* v. *McKay*, 229 F.2d 29, 30-31 (D.C. Cir. 1956), for example, the court held that submerged lands within three miles of shore are not "public lands" subject to disposition under the Mineral Lands Leasing Act, 30 U.S.C. 181 *et seq.*

Any doubt as to the meaning of "public lands" is dispelled by the definition of the phrase contained in Section 102(3) of ANILCA, 16 U.S.C. 3102(3). Subject to certain exceptions not relevant here, the statute provides that

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[11] *Gambell I* left several issues open for consideration on remand (App. 65a), and there is thus no bar to this Court's review of its holding, together with the issues decided in *Gambell II*. See *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955); see also *Falk* v. *Brennan*, 414 U.S. 190, 194 n.7 (1973).

"public lands" are "land[s] situated in Alaska which * * * are Federal lands." "Federal land" is defined in Section 102(2), 16 U.S.C. 3102(2), to mean "lands the title to which is in the United States * * *." Thus, the OCS can be "public lands" subject to Section 810 only if it is "in Alaska" and if title thereto is in the United States. Neither condition obtains. The OCS is, by definition, outside the boundaries of Alaska. See 43 U.S.C. 1301(a), 1331(a). Furthermore, the United States asserts only "sovereign rights [over the OCS] for the purpose of exploring and exploiting its natural resources," Convention on the Continental Shelf, *done* Apr. 29, 1958, art. 2, para. 1, 15 U.S.T. 471, 473, T.I.A.S. No. 5578; it does not claim "title or ownership in the conventional sense." *United States* v. *Louisiana*, 339 U.S. 699, 704 (1950); see also *United States* v. *Maine*, 420 U.S. 515, 517 (1975); *Treasure Salvors, Inc.* v. *Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 339-340 (5th Cir. 1978).[12] Thus, the plain language of the Act clearly demonstrates that Congress did not intend "public lands" as used in Section 810 to include the OCS.[13]

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[12] The Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.*, carefully distinguished the "title" to the seabed granted to the states from the "jurisdiction and control" over the OCS retained by the federal government. 43 U.S.C. 1302, 1311(a)(1), 1314(a).

[13] The court of appeals relied (App. 61a) on the fact that the term "public lands" had in one case been read to apply to a particular Alaska Native offshore fishery. See *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 110-116 (1949). In *Hynes*, the Court considered a statute that authorized the Secretary of the Interior to designate as an Indian reservation in Alaska "any * * * public lands which are actually occupied by Indians or Eskimos within said Territory." Act of May 1, 1936, ch. 254, § 2, 49 Stat. 1250. The Secretary relied upon this grant of authority to extend the boundaries of an Indian reservation 3,000 feet from the shore line at mean low tide (337 U.S. at 90 n.1). The fishery thereby included in the reservation was "within [the] Territory" (which extended three miles offshore) and lay over land owned by the

The Ninth Circuit found "compelling" (App. 59a) the argument that Section 810 of ANILCA should have the same geographic scope as the extinguishment of aboriginal title effectuated by the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.* That argument, however, is seriously flawed. First, the court of appeals simply "assume[d] rather than deciding" that Alaska Natives had aboriginal rights on the OCS (App. 45a n.1). The district court, however, had convincingly rejected (App. 69a) the notion that aboriginal rights ever could have arisen on the OCS, because in that area " '[p]roperty rights must then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign.' " *Inupiat Community of the Arctic Slope* v. *United States*, 548 F. Supp. 182, 186 (D. Alaska 1982), aff'd on other grounds, 746 F.2d 570 (9th Cir. 1984) (companion case to *Gambell I*) (App. 66a-67a), cert. denied, No. 84-1801 (Oct. 7, 1985), quoting *United States* v. *Texas*, 339 U.S. 707, 719 (1950). Second, in recognition of the fact that Alaska Natives had nonetheless made claims to portions of the OCS, the drafters of ANCSA inserted into the extinguishment provision of the Act, 43 U.S.C. 1603(b), a reference to "submerged land underneath all water areas, both inland and offshore" (see App. 53a-54a). The absence of similar language in ANILCA shows that Congress did not intend that Act to apply to the OCS. Third, ANCSA extinguished aboriginal claims to federal, state, and private lands (43 U.S.C. 1603(c)), but Section 810 of ANILCA applies only to lands to which the federal government holds title. Moreover, ANCSA addressed the claims of Alaska Natives, while Section 810 of ANILCA extends to all "rural residents" of Alaska. 16 U.S.C. 3101(c). Thus, the court of appeals erroneously relied (App. 62a-63a) on the principle that statutory ambiguities

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United States. In contrast, the OCS is not in Alaska, and the federal government does not claim title to it. Clearly, the interpretation of "public lands" in *Hynes* has no application to the OCS.

should be resolved in favor of the Natives. In sum, it is plain that Congress never intended Section 810 of ANILCA to have the same geographic scope as ANCSA or for the two statutes to be read in pari materia.

The court of appeals in *Gambell I* relied on scattered statements in the legislative history of ANILCA that OCS lands were "in Alaska" (App. 58a). These statements, however, did not in any way relate to the scope of the Act. When discussing that question, the drafters of ANILCA made clear that "this legislation has nothing to do with" the OCS (125 Cong. Rec. 11170 (1979) (remarks of Rep. Emery)) and that the bill would not affect offshore oil lands, which were instead regulated by "OCS legislation" (125 Cong. Rec. 11128 (1979) (remarks of Rep. Udall)). In fact, Congress specifically rejected several proposals to extend provisions of ANILCA to the OCS. See *Hearings on H.R. 39 Before the Subcomm. on General Oversight and Alaska Lands of the Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. Pt. XIII, at 236 (1977) (proposal by Association of Village Council Presidents to extend Yukon Delta Wildlife Refuge 200 miles offshore); see also S. Rep. 95-1300, 95th Cong., 2d Sess. 112 (1978) (rejecting attempt to extend the Act to a six-mile "seaward zone"). These proposals were rejected because ANILCA "was intended to be a land bill" (124 Cong. Rec. 18025 (1978) (remarks of Sen. Stevens)), and because they would have upset the existing statutory regime governing the oceans, which was better suited to protecting ocean resources (*id.* at 18026). By its unwarranted extension of Section 810 of ANILCA to the OCS, the Ninth Circuit has brought about the very confusion and conflict that Congress sought to avoid by making ANILCA a "land bill."

b. Even if we assume arguendo that ANILCA applies to the OCS at all, the court of appeals nevertheless erred when it held that Interior could not comply with the statute by employing the stage-by-stage evaluation pro-

cedures approved by this Court in *Secretary of the Interior* v. *California, supra.* In that case, this Court reversed the Ninth Circuit's ruling that the Secretary of the Interior was required to comply with Section 307(c)(1) of the Coastal Zone Management Act (CZMA), 16 U.S.C. 1456(c)(1), at the lease sale stage because decisions made then influence or determine the nature of impacts at later stages. See *California* v. *Watt*, 683 F.2d 1253, 1260 (9th Cir. 1982), rev'd, 464 U.S. 312 (1984). In doing so, this Court relied heavily on the fact that Congress had made the stages of the OCS process separate and distinct in order "to forestall premature litigation regarding adverse environmental effects that all agree will flow, if at all, only from the latter stages of OCS exploration and production." 464 U.S. at 341 (footnote omitted).

The Ninth Circuit has once again thwarted Congress's purposes by holding that it will require hearings and findings pursuant to Section 810(a)(1)-(3) of ANILCA prior to a lease sale if it appears that the proposed disposition of public lands "would significantly restrict subsistence uses" (16 U.S.C. 3120(a)) at the development and production stage (App. 12a-13a).[14] The court of appeals tried to paper over the evident conflict with *Secretary of the Interior* v. *California* by pointing out (App. 13a) that that case dealt with the CZMA, rather than ANILCA. However, it is the 1978 amendments to the OCSLA that created the unique

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[14] The procedural requirements of Section 810(a)(1)-(3) are triggered only when the proposed disposition of public lands "*would* significantly restrict subsistence uses" (16 U.S.C. 3120(a) (emphasis added)). In *Gambell II*, the Ninth Circuit substituted the word "may" for "would" in describing the statutory standard. App. 13a. In *Tribal Village of Akutan* v. *Hodel, supra*, the district court interpreted the language used in *Gambell II* as triggering Section 810's procedural requirements upon a showing of a "mere possibility" of a restriction on subsistence uses. The government's pending appeal from that ruling asks the court of appeals to rectify the district court's erroneous reading of the plain statutory language. See note 10, *supra*.

stage-by-stage nature of the OCS process, and that framework must be respected in analyzing Interior's obligations under ANILCA as well as under the CZMA and other environmental statutes.[15] The conflict with *Secretary of the Interior* v. *California* is plain and warrants this Court's review.

c. The court of appeals conceded that the decision in *Gambell I* established a new principle of law, but reasoned that retroactive application of that decision was nevertheless warranted because it "would further the operation" of Section 810 and would not lead to "substantial inequitable results" (App. 24a). The Ninth Circuit's decision, while referring to this Court's decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971), totally distorts the retroactivity analysis spelled out in that case. First, it is impossible rationally to conclude that applying *Gambell I* to Lease Sale 83, which took place six months before that decision without any litigation challenge, furthers the purposes of Section 810. Despite the fact that no Native subsistence activity takes place in the Lease Sale 83 area, Interior carried out a substantial pre-leasing analysis of subsistence uses (see page 7, *supra*). The district court specifically found that the factors specified in Section 810(a) were considered, albeit not with ANILCA "clearly in mind" (App. 38a, 42a). After *Gambell I*, Interior prepared Section 810 analyses for each approved exploration plan, and those plans have never been challenged. Interior also announced that it would prepare new subsistence evaluations should development and production

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[15] Indeed, the court of appeals' assertion that *Secretary of the Interior* v. *California* is limited to the CZMA conflicts with another Ninth Circuit decision, *Village of False Pass* v. *Clark*, 733 F.2d 605 (1984), which rejected claims that a lease sale had been conducted in violation of the Endangered Species Act and NEPA, because those claims ignored the stage-by-stage nature of the OCS process (733 F.2d at 608-609, 611, 614-616).

ever be proposed. In these circumstances, requiring Interior to reconsider subsistence issues as they pertain to the initial decision to lease serves no possible policy interest.

If retroactive application of *Gambell I* were to lead to a voiding of leases (a question left open in *Gambell II*), the financial impact on the federal government could be enormous (see page 21, *supra*). The court of appeals clearly erred in concluding (App. 25a) that Interior brought this potential outcome on itself. It is unreasonable in the extreme to suggest that Interior should have altered its course with respect to Lease Sale 83 based on the possibility that the villages in the Lease Sale 57 action might obtain a reversal of the district court's decision holding that ANILCA did not apply to the OCS. Retroactive application of *Gambell I* is clearly inequitable.

CONCLUSION

The petition for a writ of certiorari should be granted, together with the petition in No. 85-1239, and the two cases consolidated for purposes of oral agrument.

Respectfully submitted.

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FEBRUARY 1986

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* The Solicitor General is disqualified in this case.

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

DONALD P. HODEL, ET AL., PETITIONERS

v.

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-3877
D.C. No. A85-184 consolidated with A85-201

PEOPLE OF THE VILLAGE OF GAMBELL, PEOPLE OF THE VILLAGE OF STEBBINS, AND NUNAM KITLUTSISTI,
PLAINTIFFS-APPELLANTS,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND U.S. DEPARTMENT OF THE INTERIOR,
DEFENDANTS-APPELLEES,

ARCO ALASKA, INC., AMOCO PRODUCTION COMPANY, ET AL., DEFENDANTS-INTERVENORS-APPELLEES.

OPINION

Appeal from the United States District Court
for the District of Alaska
J.A. von der Heydt, District Judge, Presiding

Argued and submitted September 4, 1985
Seattle, Washington

Before: PREGERSON and ALARCON, Circuit Judges, and DIMMICK, District Judge*

ALARCON, *Circuit Judge*:

The People of the Village of Gambell, et al. (hereinafter the Villages),[1] appeal from an order of the district court of Alaska denying consolidated motions for a preliminary in-

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* Honorable Carolyn R. Dimmick, United States District Judge for the Western District of Washington, sitting by designation.

[1] On this appeal from consolidated motions for preliminary injunction, the Villages include the People of the Village of Gambell and The

junction. The requested injunction would prohibit exploration for oil and gas on two tracts leased to appellees/intervenors, Arco Alaska, Inc. and Amoco Production Co., et al. (hereinafter the Oil Companies), by the United States Department of the Interior on federally owned lands in the outer continental shelf of Alaska.

We must determine whether the district court abused its discretion in failing to issue a preliminary injunction notwithstanding its determination that the Villages had a "strong likelihood of success on the merits" in light of the presumption of harm flowing from a violation of a statute and the facts in the record showing the possibility of a significant restriction of subsistence use. We conclude that the district court abused its discretion in denying a preliminary injunction because it failed to give proper weight to Congress's expressly stated policy of protecting the subsistence needs and culture of Native Alaskans against the harm which may result from the lease of public lands in the outer continental shelf.

PERTINENT FACTS

This matter is again before this court following our decision in *People of the Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984) (hereinafter *Gambell I*). In *Gambell I*, the People of the Village of Gambell and the People of the Village of Stebbins brought an action in the district court to enjoin the sale of leases located in federally owned outer continental shelf land in Lease Sale 57. The Secretary of the Interior (hereinafter the Secretary) had offered to sell the leases for oil and gas exploration pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (as

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People of the Village of Stebbins, two Alaskan Native Tribes organized under the Indian Reorganization Act. Also included is Nunam Kitlutsisti, an intertribal organization representing subsistence users from 56 villages of the Yukon-Kuskokwian Delta in southwestern Alaska.

amended 1980) (hereinafter the Lands Act). Bids were submitted by the oil companies. Lease Sale 57 consists of approximately 2.4 million acres in the Norton Sound Basin twenty-five miles off the western shore of Alaska.

In *Gambell I* the Villages presented two arguments to the district court in support of their request for an injunction. First, the Villages contended that the sale of leases for oil and gas exploration would interfere with their aboriginal hunting and fishing rights. Second, they asserted that the Secretary failed to evaluate the impact of such laws on the subsistence culture of Native Alaskans as required by section 810 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101-3233 (1980) (hereinafter the Conservation Act) prior to conducting the sales. The district court denied the Villages' motion for a preliminary injunction and granted the Secretary's motion for summary judgment. The district court held that the Villages' aboriginal hunting and fishing rights and their rights protected under section 810 of the Conservation Act did not extend to the outer continental shelf outside the territorial boundaries of Alaska.

In his briefs before this court in *Gambell I,* the Secretary argued that if this court " '[s]hould . . . find it appropriate to order the Secretary to carry out the procedures of section 810, there is no need to undo what has already been done. The proper role for the court is to simply maintain the status quo while the Secretary does whatever is necessary to comply.' " (Appellants' Reply Brief at 4, *quoting* Brief for Federal Appellees (*Gambell I*), at 49). The oil companies made a similar but more specific recommendation in their brief in *Gambell I.* " 'If this court should hold that § 810 of ANILCA applies to the OCS [outer continental shelf], the appropriate remedy would be . . . to enjoin further activities until the Secretary completes the procedures required by the statute, if irreparable harm is shown, *see Weinberger v. Romero-Barcelo,* 456 U.S. 305 (1982). ' " (Appellants' Reply Brief at 4, *quoting* Brief of Appellee Arco Alaska, Inc. (*Gambell I*), at 49).

We held in *Gambell I* that the Villages' claims to an aboriginal right to hunt and fish in Norton Sound and in the waters in the outer continental shelf were extinguished by the Alaska Native Claims Settlement Act (hereinafter Claims Settlement Act), 43 U.S.C. §§ 1601-1628 (1971), but that in section 810 of Title VIII of the Conservation Act, Congress provided protection for subsistence uses of the fish and wildlife in the waters and ice over the outer continental shelf by requiring the Secretary to evaluate the effect of a lease sale on subsistence use. *Gambell I*, 746 F.2d at 579-82. In reversing the district court's orders in *Gambell I*, we gave the following direction to the district court:

> Appellants ask that the lease sale be voided because the Secretary has not complied with the requirements of section 810. Appellees contend that the Secretary has substantially complied with the requirements of the section, albeit acting under other statutes, and if he has not, the proper remedy is to maintain the status quo unless and until the Secretary complies with section 810, citing *California v. Watt*, 683 F.2d 1253, 1266 (9th Cir. 1982), *reversed on other grounds*, _____ U.S. _____, 104 S. Ct. 656, 78 L.Ed.2d 496 (1984).
>
> These arguments raise factual and legal issues that have not been but should be considered initially by the district court.

Gambell I, 746 F.2d at 582-83.

Gambell I was argued before this court on October 7, 1983. On April 17, 1984, while the matter concerning Lease Sale 57 was still under submission to this court, the Secretary held a sale of leases on Lease Sale 83 in the outer continental shelf lands in the Navarin Basin off the shore of Alaska. This court filed its opinion in *Gambell I* on November 2, 1984. Due primarily to delays requested by the Secretary, the decision in *Gambell I* did not become final until mandate issued on March 2, 1985.

On April 3, 1985, the People of the Villages of Gambell and Stebbins brought a motion for preliminary injunction to halt exploratory activities on Lease Sale 57.

On April 25, 1985, the People of the Village of Gambell and the intertribal organization of Nunam Kitlutsisti filed a separate action to enjoin future exploratory activities on Lease Sale 83 and to rescind the authority previously granted to the Oil Companies in that portion of the outer continental shelf. Lease Sale 83 consists of approximately 37 million acres and is located in the water of the Bering Sea in the outer continental shelf due west of St. Mathews Island, approximately 250 miles from the mainland of Alaska.

This separate complaint was based on precisely the same grounds alleged in the prior action (*Gambell I*) concerning Lease Sale 57: i.e., that the Secretary failed to comply with section 810 of the Conservation Act prior to authorizing exploratory activities in the waters over the outer continental shelf. The district court consolidated these matters for the hearing on the Villages' motion for a preliminary injunction.

The district court applied the "traditional" test for determining whether injunctive relief is warranted, and denied the request for a preliminary injunction. The district court first explained that the Secretary did not comply with the requirements of section 810 of the Conservation Act because he failed to evaluate the subsistence impacts of the leases with the mandate of that law clearly in mind. After finding that "delay in the exploration of the OCS [outer continental shelf] many cause irreparable harm to this nation's quest for new oil resources and energy independence," the court nonetheless concluded:

(1) Movants have established a strong likelihood of success on the merits.

(2) The balance of irreparable harm does *not* favor the movants.

(3) The public interest favors continued oil exploration, for the reason that the national interest favors OCS

> [outer continental shelf] oil exploration and such exploration will not cause the type of harm, a restriction in subsistence uses or resources, that ANILCA was designed to prevent.

On May 30, 1985, the district court issued a minute order *sua sponte* stating that:

> The court has been informed that its denial of plaintiffs' motion for preliminary injunction will be appealed to the Ninth Circuit. In order to expedite the appeal, and for the reasons stated in this court's earlier order, the court indicates that it will not entertain a motion for stay pending appeal.

On June 6, 1985, a motions panel of this court issued an order denying the Villages' emergency motion for an injunction pending appeal. The Secretary and the Oil Companies were ordered to file, within seven days, a hold harmless agreement "that will protect appellants from any consequences resulting from significant restrictions upon subsistence uses by appellants of their lands." The motions panel retained jurisdiction of this matter for "the purpose of reimposing a temporary stay should the panel disapprove the form and substance of the hold harmless agreement." The hold harmless agreement was approved by the motions panel on June 21, 1985.

DISCUSSION

Our review of a motion for a preliminary injunction is "very limited." *Apple Computer, Inc. v. Formula International, Inc.*, 725 F.2d 521, 523 (9th Cir. 1984). "The decision to grant or deny is within the discretion of the trial court and will only be reversed if that discretion has been abused or if the decision is based on erroneous legal standards or clearly erroneous findings of fact." *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985).

A. *Applicability of the Traditional Test*

This court has recognized two sets of standards for evaluating a claim for injunctive relief. We refer to one as the "traditional" test and the other as the "alternative" test. *American Motorcyclist Ass'n v. Watt,* 714 F.2d 962, 965 (9th Cir. 1983). In *American Motorcyclist Ass'n* we described the traditional test as follows: "The traditional equitable criteria for determining whether an injunction should issue are (1) Have the movants established a strong likelihood of success on the merits; (2) does the balance of irreparable harm favor the movants; (3) does the public interest favor granting the injunction?" *Id.* at 965.

"The 'alternative' test permits the moving party to meet its burden by demonstrating either a combination of probable success and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in its favor." *Id.* (*citing Benda v. Grand Lodge of IAM,* 584 F.2d 308, 314-15 (9th Cir. 1978), *cert. dismissed,* 441 U.S. 937 (1979); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,* 526 F.2d 86, 88 (9th Cir. 1975)).

We have concluded, however, that the traditional and the alternative tests are "not really two entirely separate tests, but that they are merely extremes of a single continuum." *Benda v. Grand Lodge of IAM,* 584 F.2d at 315. *Accord, Regents of University of California v. ABC,* 747 F.2d 511, 515 (9th Cir. 1984); *Los Angeles Memorial Coliseum Comm'n v. National Football League,* 634 F.2d 1197, 1200 (9th Cir. 1980). We have also noted that "[t]he difference between the two formulations is insignificant. Therefore, we accept either as satisfactory." *Benda,* 584 F.2d at 315. Because the district court employed only the traditional test, we will review the findings under that formulation. *See Regents of University of California v. ABC,* 747 F.2d at 515-16 n.4 (where the district court made a

finding that the public interest favored the issuance of the preliminary injunction, this court reviewed the district court's findings under the traditional standard).

B. *Likelihood of Success on the Merits*

The Villages argue that the district court properly determined that they had established "a strong likelihood of success on the merits" on their claim that the Secretary could not have substantially complied with the provisions of the Conservation Act because he did not have its mandates "clearly in mind." The district court correctly concluded that an administrative decision compelled by a land preservation statute must be made with the requirements imposed by Congress clearly in mind. *See Stop H-3 Ass'n v. Coleman,* 533 F.2d 434, 445 (9th Cir.) ("a court reviewing the Secretary's 4(f) decision must satisfy itself that the Secretary evaluated the highway project with the mandates of section 4(f) clearly in mind"), *cert. denied,* 429 U.S. 999 (1976). *Accord, Adler v. Lewis,* 675 F.2d 1085, 1092 (9th Cir. 1982).

Prior to Lease Sale 57 and Lease Sale 83, the Secretary did not have the requirements of Congress in mind because it was his contention that section 810 of the Conservation Act did not apply to land beneath the water of the outer continental shelf off the coast of Alaska. Section 810(a) of the Conservation Act provides in pertinent part as follows:

> In determining whether to . . . lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee *shall evaluate* the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes.

16 U.S.C. § 3120(a) (1982) (emphasis added). Therefore, in determining whether to approve Lease Sale 57 or Lease Sale 83, the Secretary did not evaluate the effect of such leases on subsistence uses and needs of the Native Alaskans who are part of the Villages.

We agree with the district court's determination that the Secretary failed to comply with the mandatory requirements of section 810(a). In *Kunaknana v. Clark,* 742 F.2d 1145 (9th Cir. 1984), we said that section 810(a) "requires the agency to evaluate the effects upon subsistence needs of leasing the particular tracts tentatively selected . . . ." *Id.* at 1151. After *Gambell I,* it is clear that section 810(a) does apply to public lands in the outer continental shelf.

The Secretary contends, however, that his compliance with the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321-4347 (1976) (hereinafter the Environmental Act or NEPA) and the Lands Act is sufficient to satisfy the evaluation provisions of section 810(a) of the Conservation Act. The Secretary asserts that "[T]here is no additional requirement that the agency decision maker have one statute in mind rather than another when he takes the action." This argument completely ignores this court's observation in *Gambell I* that section 810 was enacted because "the Secretary and the state [of Alaska] failed to heed Congress's admonition [that they take any action necessary to protect subsistence needs of Alaskan Natives]." *Gambell I,* 746 F.2d at 580.

The uncontradicted facts in this matter establish that the Secretary deliberately ignored the specific requirements of section 810(a) prior to the lease sales because of his erroneous belief that its provisions did not apply to the outer continental shelf. Nevertheless, we are now told that the Secretary complied with the Conservation Act prior to the lease sales because in meeting the requirements of the Environmental Act and the Lands Act he inadvertently con-

sidered the needs of the subsistence users. If we were to adopt this surprising contention, we would render section 810(a) superfluous and assume that its enactment was an idle act. "We should not and do not suppose that Congress intended to enact unnecessary statutes." *Jackson v. Kelly,* 557 F.2d 735, 740 (10th Cir. 1977).

It is quite true that section 810(a) makes reference to the Environmental Act. Section 810(a)(2)(b) provides as follows:

> If the Secretary is required to prepare an environmental impact statement pursuant to [Section 102(2)(c) of the National Environmental Policy Act], *he shall* provide the notice and hearing and *include the findings required by subsection (a) of this section* as part of such environmental impact statement.

16 U.S.C. § 3120(b) (1982) (emphasis added). It is clear to us from this language that Congress intended that the section 810(a) requirement that the Secretary evaluate and make findings concerning subsistence needs *supplements* any overlapping duties which he may have under the Environmental Act.

In support of his contention that compliance with the Lands Act and The Environmental Act constitutes substantial compliance with the requirements of section 810(a) of the Conservation Act, the Secretary refers us to *Life of Land v. Brinegar,* 485 F.2d 460, 474 (9th Cir. 1973), *cert. denied,* 416 U.S. 961 (1974), *Citizens Airport Comm. v. Volpe,* 351 F. Supp. 52 (E.D. Va. 1972), *Environmental Defense Fund, Inc. v. Froehlke,* 473 F.2d 346, 356 (8th Cir. 1972), *Cape Henry Bird Club v. Laird,* 484 F.2d 453, 454 (4th Cir. 1973), and *Missouri ex rel. Ashcroft v. Dep't. of Army,* 526 F. Supp. 660, 667 (W.D. Mo. 1980), *aff'd,* 672 F.2d 1297 (8th Cir. 1982). These authorities do not support the Secretary's contention that

compliance with either the Lands Act or the Environmental Act constitutes de facto compliance with the Conservation Act.

In *Brinegar,* we held that an environmental impact statement prepared pursuant to the Environmental Act may be considered as the finding of no adverse environmental effect required under section 16(c)(4) of the Airport and Airways Development Act of 1970 because each statute contains virtually the same requirements. 485 F.2d at 474. In *Citizens Airport Comm.,* the district court noted, in passing, that "[t]he fact that the impact statement was prepared for the purpose of satisfying NEPA does not prevent its being used to satisfy the requirements of § 1716 [of the Airport and Airways Development Act of 1970, 49 U.S.C. § 1701 *et seq.*] if, in fact, it contains all of the findings demanded by that provision." 351 F. Supp. at 59. In *Environmental Defense Fund, Inc. v. Froehlke,* the court held that if an agency complies with the Environmental Act, it will " 'automatically take into consideration all of the factors required by the Fish and Wildlife Act and it is not reasonable to require them to do both separately.' " 473 F.2d at 356 (*quoting Environmental Defense Fund, Inc. v. Corps of Engineers,* 325 F. Supp. 749, 754 (E.D. Ark. 1971), *vacated on other grounds,* 342 F. Supp. 1211 (E.D. Ark. 1972)). We have no quarrel with the proposition that if the environmental concerns expressed in one statute are "automatically" taken into consideration on complying with the requirements of another Act of Congress, it would not be reasonable for the courts to insist on separate reports. As noted above, however, it was the failure of the Secretary to protect subsistence needs under existing administrative authority which compelled Congress to enact section 810(a). *Gambell I,* 746 F.2d at 580.

We previously have held that "compliance with one environmental statute does not assure compliance with

another." *Adler v. Lewis,* 675 F.2d at 1096. Where each statute mandates separate and distinct procedures, compliance with the requirements of one does not compel the conclusion that the provisions of the other statute were considered. *Id.* Neither the Environmental Act nor the Lands Act sets forth procedures to ensure the protection of subsistence needs and uses. In contrast, the Conservation Act was created "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." Conservation Act § 101(c), 16 U.S.C. § 3101 (c) (1982).

As we noted in *Gambell I,* "Congress found that continuation of the opportunity of rural Alaskans to make subsistence use of fish and wildlife 'is essential to [their] existence'." *Id.* at 580 (*quoting* Conservation Act § 801(1), 16 U.S.C. § 3111(1)(1980)). The separate and distinct procedures set forth in section 810(a) of the Conservation Act were enacted to fulfill that purpose. The Environmental Act and the Lands Act do not, by their terms, seek to advance the same Congressional goals. For purposes of resolving the issues presented in reviewing the denial of a preliminary injunction, we conclude that the district court did not err in its determination that there was a strong likelihood that the Villages would succeed at trial on the merits in their legal contention that substantial compliance with the Environmental Act and the Lands Act would not constitute automatic or substantial compliance with the Conservation Act.

The district court also concluded that the Villages had a strong likelihood of success on the merits of their contention that the Secretary violated the notice, hearing, and findings requirements of section 810(a)(1)-(3) in connection with Lease Sale 57. We agree.

Under section 810(a)(1)-(3), the Secretary is prohibited from leasing public lands without complying with the notice and hearing procedures if the agency concludes that

the proposed action "may significantly restrict subsistence uses." *Kunaknana v. Clark,* 742 F.2d at 1151. After receiving this court's opinion in *Gambell I,* the Secretary conducted a post-sale study concerning Lease Sale 57. That report contains the finding that while the lease and exploration stages will not significantly restrict subsistence, development and production "may significantly restrict subsistence uses in certain areas." We made it clear in *Kunaknana* that under the express language of section 810(a)(3), the Secretary was required to comply with the notice and hearing requirements of the statute to determine *inter alia* whether " 'such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands.' " 742 F.2d at 1150-51 (*quoting* section 810(a)(3)).

The Secretary agrues that he was not required to comply with the notice and hearing requirements of section 810(a)(1)-(3) prior to the sale of the leases with respect to the significant restriction of subsistence use that may develop at the production stage. The Secretary relies on *Secretary of Interior v. California,* 464 U.S. 312 (1984). His reliance is misplaced. First, in *Secretary of the Interior v. California,* the Supreme Court did not concern itself with a construction of section 810(a)(1)-(3) of the Conservation Act. The Court was faced with the question whether section 307(c)(1) of the Coastal Zone Management Act applies prior to a lease sale. *Id.* at 315. As the district court in the instant matter correctly noted, the decision of the Supreme Court that the Coastal Zone Management Act did not apply to lease sales was premised on the fact that Congress had recognized "four distinct statutory stages to developing an offshore oil well." *Id.* at 337. The four steps set forth in the Lands Act are as follows:

1. The planning of a five-year nationwide leasing program. 43 U.S.C. § 1344.

2. The lease sale. 43 U.S.C. § 1337(a).
3. Exploration. 43 U.S.C. § 1340.
4. Development and production. 43 U.S.C. § 1351.

In the Conservation Act, however, Congress has expressly provided for a specific and detailed procedure to be followed in evaluating the impact on subsistence use of the lease of public land for exploratory activities. As this court pointed out in *Kunaknana v. Clark*, section 810(a) of the Conservation Act requires a hearing *before* a lease shall be effected if such lease "or other use, occupancy or disposition of such [public] lands" may significantly restrict subsistence use. 742 F.2d at 1150-51. "It is a basic rule of statutory construction that a specific statute controls over a general statute. *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981). If we were to hold that the more general statute controls over the specific one, we would effectively eliminate the specific statute." *Edward D. Rollert Residuary Trust v. C.I.R.*, 752 F.2d 1128, 1133 (6th Cir. 1985).

The district court did not err in determining, for purposes of ruling on the Villages' motion for a preliminary injunction, that the Villages had demonstrated a strong likelihood of success on the merits of their contention that the Secretary failed to comply with the notice and hearing requirements of the Conservation Act concerning Lease Sale 57. We are satisfied that there is a strong likelihood of success on the merits of the Villages' argument that the specific procedural requirements of section 810(a)(1)-(3)—which are triggered by the threat of a significant restriction of subsistence use—were intended by Congress to serve as an exception to the general provisions of the Lands Act.

C. *Balance of Irreparable Harm*

Notwithstanding its determination that the Secretary violated the procedural requirements of section 810(a) of

the Conservation Act, the district court denied the Villages' request for a preliminary injunction. The district court's ruling is not consistent with the law of this circuit. An injunction is the appropriate remedy for a substantive procedural violation of an environmental statute. *See Thomas v. Peterson,* 753 F.2d 754, 764 (9th Cir. 1985). "Irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action." *Save Our Ecosystems v. Clark,* 747 F.2d 1240, 1250 (9th Cir. 1984). In *Save Our Ecosystems v. Clark,* we also noted that "[o]nly in a rare circumstance may a court refuse to issue an injunction when it finds a NEPA violation." *Id.* at 1250. " 'It does not appear that any lower court, much less the Supreme Court, has ever found in a proceeding on the merits that federal actions violating NEPA could continue in opposition to the statutory mandates.' " *Id.* at 1250 n.15 (*quoting* Plater, *Statutory Violations and Equitable Discretion,* 70 Cal. L. Rev. 524, 575 (1982)).

Mindful of the law in this circuit, the district court concluded that there were unusual circumstances in the instant matter which made the issuance of an injunction "inappropriate." However, the court did not articulate the unusual circumstances upon which it relied to excuse its duty to issue an injunction in light of its determination that there was a strong likelihood that the Villages would prevail in their contention that section 810(a) of the Conservation Act had been violated. Instead, the court found as follows:

> (1) That delay in the exploration of the OCS may cause irreparable harm to this nation's quest for new oil resources and energy independence. Expedited exploration as a policy is stated in OCSLA. *See* 43 U.S.C. § 1332(3);
>
> (2) That exploration will not significantly restrict subsistence resources; and

(3) That the Secretary continues to possess power to control and shape the offshore leasing process. Therefore, if the ANILCA subsistence studies require alteration of the leasing conditions or configuration the Secretary will be able to remedy any harm caused by the violation.

The district court relied upon *Forelaws on Board v. Johnson,* 743 F.2d 677 (9th Cir. 1984) and *Alaska v. Andrus,* 580 F.2d 465 (D.C. Cir.), *vacated in part on other grounds as moot,* 439 U.S. 922 (1978). These cases do not support the district court's conclusion that these factors justify the denial of an injunction under the circumstances of this case. Notwithstanding a violation of the Environmental Act, this court refused to issue an injunction in a matter over which it had original jurisdiction because such relief would interfere with the operation of 20-year contracts, most of which were then in the third year of their term. *Forelaws on Board v. Johnson,* 743 F.2d at 685. Here, however, the injunction was sought *prior* to the sale of any leases in the outer continental shelf; therefore, the issuance of an injunction, at the time it was requested, would not have interfered with a long-term contractual relationship. The first well on Lease Sale 83 was not spudded until June 2, 1985. The Villages' consolidated requests for injunctive relief were denied on May 23, 1985. Had the district court issued a preliminary injunction when it was first requested, no leases would have been made until the requirements of the Conservation Act were met.

Alaska v. Andrus is factually distinguishable and contrary to the law of this circuit. First, the D.C. Circuit Court apparently does not follow the Ninth Circuit rule that injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances. *See Thomas v. Peterson,* 753 F.2d at 764 ("absent 'unusual circumstances,' an injunction is the appropriate remedy for a violation of NEPA's procedural re-

quirements"); *Alpine Lakes Protection Society v. Schlapfer,* 518 F.2d 1089, 1090 (9th Cir. 1975) (the policies underlying an environmental protection statute (NEPA) "weight the scale in favor of those seeking the suspension of all action until the Act's requirements are met"). The Ninth Circuit rule was not discussed in *Alaska v. Andrus.* Instead, the D.C. Circuit followed a rule which restricts the availability of an injunction against an ongoing project to cases where it is necessary primarily "to preserve for the relevant decisionmaker the full opportunity to choose among alternatives that is contemplated by NEPA." *Alaska v. Andrus,* 580 F.2d at 485.

This court has found "unusual circumstances" in cases which have upheld the denial of a preliminary injunction to enjoin a project from proceeding in violation of an environmental protection statute where irreparable harm *to the environment* would result if such relief were granted. *Thomas v. Peterson,* 753 F.2d at 764 n.8. Similarly, in *Alpine Lakes Protection Society v. Schlapfer,* we denied a motion for an injunction pending appeal notwithstanding the presence of substantial questions concerning the Forest Service's compliance with the Environmental Act, because the issuance of an injunction against the use of a logging road would prevent the removal of diseased trees and permit the spread of insect infection throughout the adjacent national forest lands. 518 F.2d at 1090.

In *American Motorcyclist Ass'n v. Watt,* the plaintiffs filed an action to enjoin the Secretary's plan to conserve and protect the fragile resources in the California desert from recreational use. 714 F.2d at 963-64. The plaintiffs alleged that the plan would prevent traditional recreational vehicle use of the California desert and diminish the number of motorcyle events. *Id.* The district court expressly found that "there was a danger of harm to the fragile desert resources of the [California Desert Conservation Area] if the Plan's restrictions were lifted and plain-

tiffs were allowed to pursue increased motor vehicle use." *Id.* at 966. We upheld the denial of a preliminary injunction in *American Motorcyclist Ass'n v. Watt* in the face of a strong showing on the merits that the Secretary of the Interior had violated procedural provisions of the Environmental Act, because of the presence of unusual circumstances, i.e. the damage to fragile desert resources. *Id.* at 966-67. We discussed the impact of the exception to the rule set forth in *Alpine Lakes Protection Society v. Schlapfer,* requiring the issuance of a preliminary injunction upon a showing of a violation of the procedural prerequisites of an environmental statute, and explained: "*Alpine* thus authorizes the court not only to weigh the relative hardship and harms to the parties, but to examine how the greater public interest may be affected in the unusual case where enjoining government action allegedly in violation of NEPA might actually jeopardize natural resources." *American Motorcyclist Ass'n v. Watt,* 714 F.2d at 966.

In the matter before us the district court did not and could not make a finding that the issuance of a preliminary injunction preventing lease sales would endanger the subsistence uses and resources of the waters off the coast of Alaska. In fact, the Secretary's lease sale plan poses the type of danger to the subsistence culture of Alaskan Natives that moved Congress to enact section 810(a) of the Conservation Act. In *Gambell I,* we expressed this view as follows:

> When Congress adopted the Claims Settlement Act it was aware that extinguishing Native rights might threaten subsistence hunting and fishing by Alaska Natives. The Senate version of the Claims Act included provisions directing the Secretary to protect subsistence uses on public lands. The Conference Committee eliminated this provision, but the Committee made it clear that it did so only because it concluded

> subsistence resources should be protected by the Secretary of Interior through the exercise of existing administrative authority. The Committee wrote: "The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives." *See* H. Conf. Rep. No. 746, 92d Cong., 1st Sess. 37, *reprinted in* 1971 U.S. Code Cong. & Ad. News 2247, 2250. Title VIII of the Conservation Act was enacted because the Secretary and the state failed to heed Congress's admonition.

Gambell I, 746 F.2d at 580.

The record does not disclose any unusual circumstances which threaten the environment such as those which we recognized in *Alpine Lakes Protection Society v. Schlapfer* and *American Motorcylists Ass'n v. Watt*, which would justify denial of a preliminary injunction where there is a strong likelihood that the Villages will succeed in demonstrating that the Secretary has violated a statute directed at preserving or conserving the environment. On the contrary, the Secretary's leasing plan poses a threat to the preservation of the subsistence culture of Native Alaskans. Nor would the issuance of a preliminary injunction have interrupted the performance of long-term contracts as was the case in *Forelaws on Board v. Johnson*. We conclude, therefore, that the district court erred in finding that this is the type of rare or unusual case that justifies the denial of a preliminary injunction in the face of its conclusion that there is a strong likelihood of success on the merits.

D. *Public Interest*

As set forth above, the district court found that the public interest favored oil exploration in the outer con-

tinental shelf. This finding is not supported by a recitation of the facts relied upon by the district court that would demonstrate how the district court divined the public interest.

The Secretary correctly observes that the purpose of the 1978 amendments to the Lands Act was to expedite the

> exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade . . . .

43 U.S.C. § 1802 (as amended 1978).

The Secretary continues to ignore, however, the fact that section 810(a) of the Conservation Act was adopted by Congress "to benefit the Natives" and to be "consistent with the Congressional policy established by section 802(1) that the management of the public lands shall cause the least adverse impact possible on rural residents who depend upon subsistence uses." *Gambell I,* 746 F.2d at 581 (*quoting* 126 Cong. Record 29,279 (1980)). As our highest court noted in a different context, "[t]he choice between these two policy arguments is not ours to make; it has already been made by Congress." *Secretary of Interior v. California,* 464 U.S. at 342.

Congress enacted section 810(a) in 1980 to protect the subsistence culture of Native Alaskans from exploration of the outer continental shelf that would impair their subsistence needs and uses. The Conservation Act defines subsistence uses as follows:

> [T]he customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for

> personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

16 U.S.C. § 3113 (1982).

The maintenance of this subsistence economy is requisite to the literal survival of these isolated Alaskan tribal villages. On St. Lawrence Island alone, 80 percent of all food consumed annually comes from the sea and land. A substantial portion of their cash income comes from carved walrus ivory. Moreover, even if the community's physical survival is not placed in immediate jeopardy by disruptions from oil and gas exploration, the very social structure of the village is jeopardized. "A reduced availability of naturally recurring resources . . . alter[s] the depth, breadth and strength of the clans, *the organizational core of society*." Ronald L. Little and Lynn A. Robbins, Technical Report No. 89, *Effects of Renewable Resource Harvest Descriptions on Socioeconomic and Sociocultural Systems: St. Lawrence Island,* at 304 (emphasis added). Subsistence is nothing less than "a symbolic and organizational base for their spiritual life." *Id.* at 360.

The district court's finding that the public interest favored oil exploration over the preservation of the subsistence culture of the Alaskan Natives violates the clearly expressed Congressional intent that lease sales *shall not* be conducted until the Secretary has evaluated the effect of the Oil Companies' activities on the subsistence uses and needs of Native Alaskans. The by-products of oil and gas exploration such as potential oil spills, leakage, and noise pose the threat of disruption to subsistence economy sufficient to destroy irreparably the isolated and unique culture of the Native Alaskans. *Id.* at 330-374. This error of law compels reversal.[2]

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[2] Appellees rely on *Weinberger v. Romero-Barcelo,* 456 U.S. 305 (1982) for the proposition that "[a] showing of threatened irreparable harm has always been the prime prerequisite for obtaining injunctive

E. *Retroactivity*

The Secretary and the Oil Companies argue that our decision in *Gambell I* may not be applied retroactively to Lease Sale 83. This contention was not raised in the district court. Ordinarily, we "will not . . . review an issue not raised below unless necessary to prevent manifest injustice." *International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985). However, we have the discretion to review issues raised for the first time on appeal "if it would not cause the parties to develop new facts." *Whittaker Corp. v. Execuair Corp.*, 736 F.2d 1341, 1346 (9th Cir. 1984). We will address the retroactivity issue because it does not involve a fact determination and because it is central to the case and important to the public. *Commodity Futures Trading Comm'n v. Co Petro Marketing Group, Inc.*, 680 F.2d 573, 581 (9th Cir. 1982).

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relief." Brief for the Federal Appellees p. 40. *Romero-Barcelo* is distinguishable from the matter before us in several important respects.

First, *Romero-Barcelo* did not involve the tension between the requirements of the Conservation Act and the Lands Act. Instead, the narrow question before the Court in *Romero-Barcelo* was stated as follows:

> The issue in this case is whether the Federal Water Pollution Control Act (FWPCA or Act), 86 Stat. 816, as amended, 33 U.S.C. § 1251 *et seq.* (1976 ed. and Supp. IV), requires a district court to enjoin immediately all discharges of pollutants that do not comply with the Act's permit requirements or whether the district court retains discretion to order other relief to achieve compliance.

456 U.S. at 306-07. The Supreme Court observed that injunctive relief was not the only means of insuring compliance under the statute. The Court noted that "[t]he FWPCA itself, for example, provides for fines and criminal penalties. 33 U.S.C. §§ 1319(c) and (d)." *Id.* at 314. The Court construed the statute as permitting the district court "to order that relief it considers necessary to secure prompt compliance with the Act. That relief can include, but is not limited to, an order of im-

The Secretary and the Oil Companies rely primarily upon *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971) to support their retroactivity argument. In *Chevron Oil Co.,*

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mediate cessation." *Id.* at 320. Unlike the FWPCA, the injunctive relief we grant is the only means of insuring compliance under section 810.

In *Romero-Barcelo,* the Supreme Court contrasted the requirements imposed by Congress in the FWPCA with its construction of the Endangered Species Act (87 Stat. 884, 16 U.S.C. § 1531 *et seq.*) in *Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978). In *TVA v. Hill,* the Supreme Court held that an imminent violation of the Endangered Species Act required injunctive relief. *Id.* at 172-73. In *Romero-Barcelo,* the Court summarized its holding in *TVA v. Hill* as follows:

> Refusal to enjoin the action would have ignored the 'explicit provisions of the Endangered Species Act.' 437 U.S., at 173. Congress, it appeared to us, had chosen the snail darter over the dam. The purpose and language of the statute limited the remedies available to the District Court; only an injunction could vindicate *the objectives of the Act.*

Romero-Barcelo, 456 U.S. at 314 (emphasis added).

It appears to us that in enacting section 810, Congress has chosen the protection of subsistence life over oil exploration. Thus, only the issuance of a preliminary injunction to compel compliance with the requirements of section 810 can uphold Congressional intent. "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought." *TVA v. Hill,* 437 U.S. at 194.

Secondly, *Romero-Barcelo* is not dispositive because in that matter the district court denied injunctive relief after a trial on the merits of the complaint for injunctive relief. This matter is before us on an interlocutory appeal. We do not know what evidence will be developed at trial. In the absence of a fully developed trial record, we cannot now decide whether a permanent injunction should issue in this matter. The fact, as noted by our dissenting colleague, that this court may visit this case again should not cause us to issue an advisory opinion or attempt to usurp the function of the district court. Congress has determined that interlocutory review is available to persons seeking review of an order granting or refusing an injunction. 28 U.S.C. § 1292(a)(1). The plaintiffs in this matter have properly exercised their rights.

the Supreme Court set forth the following test for determining whether to apply a court decision retroactively:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, [citation omitted], or by deciding an issue of first impression whose resolution was not clearly foreshadowed, [citation omitted]. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' [citation omitted]. Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' [citation omitted].

404 U.S. at 106-07.

Applying the *Chevron* factors, we are persuaded that our decision in *Gambell I* should be applied retroactively. Although *Gambell I* established a new principle of law in construing section 810(a) of the Conservation Act as applicable to the outer continental shelf, our review of the prior history of section 810(a) of the Conservation Act and its stated purpose satisfies us that retroactive application of *Gambell I* would further the operation of a statute enacted by Congress expressly to protect subsistence uses and resources from any harmful effects resulting from oil exploration. No substantial inequitable results would occur from retroactive application. *See Barina v. Gulf Trading & Transportation Co.*, 726 F.2d 560, 563 (9th Cir. 1984) (a decision should not be applied retroactively if it would produce substantial inequitable results). The facts

would produce substantial inequitable results). The facts demonstrate unequivocally that the Secretary conducted Lease Sale 83 with knowledge that his right to do so without complying with the Conservation Act was in doubt in light of the fact that an appeal was then pending on Lease Sale 57. Any financial losses which may have been incurred by the Oil Companies were also incurred with full knowledge of the risks involved in expending money at a time when the validity of leases sold without compliance with the Conservation Act was pending before the court. Under the *Chevron* test, retroactive application of our prior decision in *Gambell I* is proper.

E. *Laches*

The Secretary and the Oil Companies assert that the Villages' motion for a preliminary injunction of exploratory activities on Lease Sale 83 is barred by laches. This contention is predicated on the fact that this action to enjoin Lease Sale 83 was filed on April 25, 1985, more than one year after the notice of sale was published on April 17, 1984.

We agree with the Villages that the district court properly rejected the laches claim. In order to prevail on this equitable defense, the Secretary and the Oil Companies must have demonstrated that the Villages unreasonably delayed in asserting a known legal right and that this delay caused the Secretary and the Oil Companies prejudice. *See Coalition for Canyon Preservation v. Bowers,* 632 F.2d 774, 779 (9th Cir. 1980). We review the district court's ruling concerning the defense of laches for an abuse of discretion. *Id.*

We conclude that the Villages' delay was reasonable for the following reasons:

> (1) On March 4, 1983, more than one year before the sale was held, the Village of Gambell gave the Secretary notice that it believed that section 810 of the

Conservation Act applied to leases of public lands in the outer continental shelf by filing a claim for injunctive relief concerning Lease Sale 57.

(2) On April 17, 1984, Lease Sale 83 was held.

(3) On November 24, 1984, we issued our decision in *Gambell I* wherein we held that section 810 of the Conservation Act applied to leases in the outer continental shelf. *Gambell I*, 746 F.2d at 582. On May 10, 1983, prior to Lease Sale 83, a motions panel of this court had held that there was insufficient reason to enjoin lease sales in the outer continental shelf pending appeal of the denial of the preliminary injunction requested to prevent Lease Sale 57.

(4) Thus, a challenge to Lease Sale 83 would have been useless.

Under these circumstances, the district court did not abuse its discretion in holding that the delay was reasonable and did not cause the Secretary or the Oil Companies any prejudice which was not the result of a calculated risk.

CONCLUSION

The Secretary failed to evaluate the effect on subsistence uses and needs of the Alaskan Natives prior to Lease Sale 57 and Lease Sale 83 because of his belief that section 810(a) of the Conservation Act did not apply to the outer continental shelf. For purposes of reviewing the denial of a preliminary injunction, we conclude that the district court correctly determined that there was a strong likelihood that the Villages would succeed in their claim that the Secretary failed to comply with section 810 of the Conservation Act.

The district court erred as a matter of law in concluding that these facts presented rare or unusual circumstances justifying a failure to follow the rule that a preliminary injunction should issue where a federal agency has violated

the procedural requirements of an environmental protection or conservation statute. Under these facts, the issuance of a preliminary injunction would not have resulted in a belated interruption of long term contracts or interfered with any plan to *preserve* subsistence uses or to *protect* the environment. Instead, the Secretary's plan involves exploitation of finite environmental resources and a potential threat to the subsistence culture of Alaskan Natives.

The Conservation Act was amended in 1980 for the express purpose of compelling the Secretary to consider subsistence uses and needs in exploring and developing our oil resources in the public lands beneath the outer continental shelf. The public interest as expressed by Congress in the 1980 amendments to the Conservation Act requires that the uses and needs of the Alaskan Natives, and our national concern over survival of their culture, must prevail over our possible energy needs. Thus, the denial of a preliminary injunction was error because the court misapplied the law of the circuit concerning the "unusual circumstances" exception and failed to honor the announced policy of Congress favoring the rights of Alaskan Natives over this nation's need to exploit the potential oil resources under the waters of the outer continental shelf off the shores of Alaska.

The district court is directed to enter a preliminary injunction enjoining all activities in connection with Lease Sale 57 and Lease Sale 83 pending its determination of the consolidated claims for injunctive relief and pending resolution of the issues which it must address pursuant to the instructions of this court in *Gambell I*.

In accordance with the stipulation of the parties, the hold harmless agreement will terminate as of the date that the Oil Companies inform this court that their 1985 drilling operation in Lease Sale 57 and Lease Sale 83 have terminated and that all drilling rigs and support craft have vacated the area.

Reversed and Remanded.

PEOPLE OF THE VILLAGE OF GAMBELL

v.

HODEL

No. 85-3877

DIMMICK, J. (dissenting)—This is the second time this court has punted to the trial court. In the first appeal, *Village of Gambell v. Clark,* 746 F.2d 572 (9th Cir. 1984) ("*Gambell I*") it was clear that the Secretary of Interior had violated an environmental statute by not complying with section 810 of the Alaska National Interest Lands Conservation Act (ANILCA). The court, however, did not direct the trial court to enter an injunction. Instead, the only guidance it gave to the trial court was for it to determine "the proper remedy." *Id.* at 573. The trial court determined that, at this time, a proper remedy does not include a preliminary injunction.

The majority now tells the trial court, on the same facts available in *Gambell I,* that the trial court erred and that it must enter a preliminary injunction. Nevertheless, the majority does not tell the trial court whether a permanent injunction must be issued, or whether post-sale compliance with section 810 is acceptable. Thus, this case will probably become a trilogy.

Our review of the trial court's decision denying the preliminary injunction is limited. *Apple Computer, Inc. v. Formula International, Inc.,* 725 F.2d 521 (9th Cir. 1984). The trial court's decision to grant or deny an injunction is discretionary and will be reversed only if based on erroneous legal standards or clearly erroneous findings of fact. *Sports Form, Inc. v. United Press International,* 686 F.2d 750 (9th Cir. 1982). I find that the trial court used the correct legal standard and that its findings of fact are supported by the record. Thus, I would affirm its discretionary decision to deny the preliminary injunction. I would also not apply *Gambell I* retroactively to Lease No. 83.

I.

The trial court found that while appellants were likely to succeed on the merits the balancing of the irreparable harms favored appellees, not appellants. It accordingly refused to issue a preliminary injunction.

The majority, in reversing the trial court's decision, advances a new rule: absent unusual circumstances, an injunction must be issued when an environmental statute has been violated.[1] The Supreme Court, however, has rejected such a rigid approach to the issuance of an injunction. In *Weinberger v. Romero-Barcelo,* 456 U.S. 305 (1982), the Navy had violated the provisions of an environmental statute—the federal Water Pollution Prevention and Control Act, 33 U.S.C. § 1251 (1982). The district court refused to enter an injunction pending compliance. The Court of Appeals for the First Circuit reversed holding that the district court was required to enter an injunction. *Romero-Barcelo v. Brown,* 643 F.2d 835 (1st Cir. 1981). The First Circuit stated that "regardless of the district court's finding that the Navy's dropping of ordinance caused no significant harm to the environment, it erred in failing to consider the judiciary's 'responsibility to protect the integrity of the . . . process mandated by Congress . . . .' " *Id.* at 861 (citations omitted). The Supreme Court reversed. The Court noted that the equitable remedy of an injunction requires flexibility and the exercise of discretion and that it should only be entered to protect a party from irreparable harm. *Weinberger v. Romero-Barcelo, supra* at 312. The majority does not include this case in its analysis of when an injunction should be issued for the

[1] The majority promulgates this rule as if it were well settled. That is not the case. If it were this court in *Gambell I* would have directed the trial court to enter an injunction since it was evident at that time that an environmental statute had been violated and that no unusual circumstances existed.

violation of an environmental statute. (See Majority Opinion, section C.) In my opinion it is binding precedent.

While there is a presumption that irreparable harm flows from a violation of an environmental statute, *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985), such a presumption is not irrebuttable. A party opposing the issuance of an injunction may present evidence showing that no irreparable harm will occur. Appellees have done exactly that. Appellees presented the trial court with substantial evidence showing that it was highly unlikely that exploratory activities would adversely affect subsistence resources. In addition, appellees presented evidence which showed that they would have suffered irreparable harm if a preliminary injunction had been issued. At the time the district court was deciding whether to enter a preliminary injunction, Exxon, Amoco, and ARCO had committed almost $70 million in support of their plans to explore Lease Tracts Nos. 57 and 83 during the summer of 1985. If the trial court had enjoined their exploration activities their money would have been lost. The permanent loss of $70 million constitutes substantial irreparable harm. In contrast, the appellants advanced two arguments to support the presumption of irreparable harm: (1) the danger of bureaucratic commitment and (2) speculative harm to the environment. The record amply supports the trial court's conclusion that appellants would not suffer any significant harm.[2] Thus, appellees successfully rebutted the presumption which favored appellants. Accordingly, the trial court did not err in refusing to grant the injunction.

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[2] The majority fails to specify what irreparable harms appellants will suffer and I fail to find any.

II.

The Lease No. 83 sales were conducted six and one-half months before this court filed its decision in *Gambell I*. Appellants, who were aware of Lease Sale No. 83, did not file a suit advancing the ANILCA claim as they had done in Lease No. 57. Moreover, they did not challenge Exxon's, ARCO's or Amoco's plans of exploration which were approved by the Department of Interior. Relying on these approvals, Exxon, ARCO, and Amoco committed over $60 million preparing for the 1985 drilling season. It was not until April 22, 1985, a full year after the lease sales were conducted and five months after *Gambell I* was decided that appellants filed a complaint arguing that Lease Sale No. 83 should also be voided.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Supreme Court set forth three factors to be used for determining whether to apply a court decision retroactively.[3] The majority concedes that *Gambell I* established a new principle of law. This weighs in favor of not applying *Gambell I* to Lease No. 83. I disagree, however, with the majority's conclusions as to the other two factors.

The majority concludes, without providing an adequate explanation, that the retroactive application of *Gambell I* would further the operation of the statute. Contrary to the majority's assertion, the trial court specifically found that there is no reason to believe that any aspect of Sale No. 83 will restrict subsistence uses. Moreover, retroactive application of *Gambell I* is unnecessary to achieve the statute's goals. Instead, those goals can be fully realized by a declaration that ANILCA evaluations must be published for future Alaska OCS sales and that the evaluations must

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[3] The three factors are: (1) does the decision establish a new principle of law; (2) will retroactive application of the decision further or retard its application; and (3) is it equitable to apply the decision retroactively. *Chevron Oil Co.* v. *Huson*, 409 [*sic*] U.S. 97, 106-107 (1971).

be prepared for the exploration and development/production plans of all prior sales.

Applying the third factor, the majority finds that no substantial inequitable results would follow from retroactive application. The majority views any financial loss which the appellees may have suffered as a calculated risk on their part because an appeal was pending in this court on Lease No. 57. I do not agree. As noted earlier, appellants did not object to Lease Sale No. 83. Nor did they file any objections to the plans of exploration which were approved. When the oil companies made their expenditures they were relying on a valid court judgment and relying on approved plans of exploration. To hold that those oil companies were taking a "risk" is an unfair characterization of the circumstances. To now apply a new legal principle which is unnecessary to advance the goals of a statute defies the concept of fair play.

III.

I believe this court, as in *Gambell I,* is not giving the trial court adequate guidance. In footnote 2 of its opinion, the majority states that "[i]n the absence of a fully developed trial record, we cannot now decide whether a permanent injunction should issue in this matter." Such a statement leads me to ask: What additional facts are necessary? Can the appellants produce any additional evidence that will be relevant to the decision whether a permanent injunction should be issued? I think not. The majority holds that a violation of environmental statute, absent exceptional circumstances, requires that an injunction be issued. The majority finds that no exceptional circumstances exist here and that the Secretary of Interior has violated an environmental statute. Therefore, under

the majority's holding, a permanent injunction must be issued.[4]

This court should also tell the trial court what will constitute acceptable compliance. That is, will a section 810 analysis performed *after* a lease sale satisfy the statute's requirements? This issue is critical because the Department of Interior complied with the requirements of section 810 but did so after the lease sale.[5] If a post-sale section 810 analysis will not satisfy the statute's requirements, the sales of Leases Nos. 57 and 83 must be voided. If a post-sale section 810 analysis is satisfactory, then the majority should clearly state this. Then the trial court, on remand, could determine whether the two studies done after the sale are adequate. Such a holding would not require that post-sale compliance would always be satisfactory. Under the circumstances of this case, however, allowing post-sale compliance may well be appropriate. In future lease sales, post-sale analysis may not be satisfactory since the Department of Interior now has notice that it must comply with section 810 before such sales.

The majority fails to address this issue. Consequently, the trial court will be forced once again, as it was after *Gambell I*, to decide a question of law. The losing party

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[4] The majority states that if it were to decide this issue it would be usurping the function of the district court. I cannot agree that providing the trial court with adequate guidance as to the proper application of the law can ever be characterized as usurping its function.

[5] Less than six months after *Gambell I* was decided, the Department of Interior performed a section 810 analysis for Lease No. 57 finding that the sale would not significantly restrict subsistence uses. Less than one month after *Gambell I*, the Department performed an OCS Environmental Assessment which included a section 810 analysis for Exxon's, ARCO's, and Amoco's plans of exploration for tracts in Lease No. 83. In that assessment, the Department of Interior found that the exploration proposals of the three oil companies would not significantly restrict subsistence uses.

will appeal which will result in more delay and uncertainty as to the parties' rights. Because this issue has not been resolved, we will, in all probability, see *Gambell III* before Rambo III. I therefore dissent, respectfully.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

A85-184 CIV

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND THE PEOPLE OF THE VILLAGE OF STEBBINS, AN ALASKAN NATIVE IRA ASSOCIATION, PLAINTIFFS,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND U.S. DEPARTMENT OF THE INTERIOR, DEFENDANTS,

ARCO ALASKA, INC., ET AL., INTERVENORS-DEFENDANTS.

No. A85-201 CIV

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND NUNAM KITLUTSISTI, A NATIVE INTERTRIBAL ORGANIZATION, PLAINTIFFS,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND THE U.S. DEPARTMENT OF THE INTERIOR, DEFENDANTS,

AMOCO PRODUCTION COMPANY, ET AL., INTERVENORS-DEFENDANTS.

MEMORANDUM AND ORDER

THIS CAUSE comes before the court on plaintiffs' motions for preliminary injunction. In these motions plain-

tiffs allege that the Secretary violated § 810 of ANILCA in approving Lease Sale 57 in Norton Sound and Lease Sale 83 in the Navarin Basin. For the reasons stated below, the court finds that a violation of ANILCA occurred in each case, but that an injunction is not the appropriate form of relief. As a preliminary matter, intervenor-defendants' request for oral argument is denied to expedite the business of the court. Local Rule 5(C)(1).

The Ninth Circuit recognizes two sets of standards for evaluating claims to injunctive relief, which it has termed the "traditional" and the "alternative" tests. The traditional equitable criteria for determining whether an injunction should issue are (1) Have the movants established a strong likelihood of success on the merits; (2) does the balance of irreparable harm favor the movants; (3) does the public interest favor granting the injunction?

The "alternative test permits the moving party to meet its burden by demonstrating either a combination of probable success and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in its favor. *American Motorcyclist Ass'n v. Watt,* 714 F.2d 962, 965 (9th Cir. 1983).

I. *Initial Matters*

The court finds it has jurisdiction over the above actions. The provisions of 43 U.S.C. § 1349(c)(1) and (2) do not apply for the reason stated in *People of the State of California v. Andrus,* 608 F.2d 1247, 1248-49 (9th Cir. 1979). The court also finds that laches is not applicable in that plaintiffs were reasonably diligent in bringing these actions. Finally, contrary to plaintiffs' assertions, the court finds that the Ninth Circuit did not reach the merits of whether an ANILCA violation occurred in Lease Sale 57. *See People of the Village of Gambell v. Clark,* 746 F.2d 572, 582-83 (9th Cir. 1984).

II. *ANILCA's Substantive Effect*

Plaintiffs argue that Title VIII of the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3111-3126, (ANILCA) contains substantive requirements that the Secretary must follow in lease sale tract selection. However, Congress designed ANILCA § 810 as a procedural statute. ANILCA § 810(d), 16 U.S.C. § 3120(d); *Gambell,* 746 F.2d at 582. Once the Secretary has complied with its procedural requirements, substantive decisions will not be set aside unless they are clearly arbitrary and capricious. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 (1971); *Latham v. Brinegar,* 506 F.2d 677, 692-93 (9th Cir. 1974). There simply is no requirement that the Secretary must "limit his tract selection to those tracts with the highest oil and gas potential."

III. *ANILCA § 810: The Initial Review Procedure*

For all leases, § 810 requires the federal agency involved to evaluate (1) the effect of leases on subsistence uses and needs; (2) the availability of other lands for oil and gas leasing; and (3) other alternatives which would reduce or eliminate the effect on subsistence. *Kunaknana v. Clark,* 742 F.2d 1145, 1150-51 (9th Cir. 1984). The Secretary did make such a review here. The effect of the leases on subsistence and alternatives which would reduce or eliminate the impact on subsistence were discussed at some length in the respective EIS's for the lease sales. The availability of other lands was discussed in the context of the EIS for the Secretary's Five Year leasing plan. *See* Intervenor-Defendants' Exs. B & C, Docket #90, A85-184. Nevertheless, since the Secretary violated ANILCA for the reason cited below, the court does not decide today whether this discussion is sufficient under ANILCA.

The Secretary, however, assumed that ANILCA did not apply to Outer Continental Shelf (OCS) lands when he performed the above evaluations. Consequently, he did not have the policy precepts of ANILCA in mind at the

time of evaluation. The court finds that the Secretary cannot comply with ANILCA unless he evaluates the subsistence impacts of the leases with the mandate of ANILCA clearly in mind. *See Adler v. Lewis,* 675 F.2d 1085, 1092 (9th Cir. 1982); *Stop H-3 Ass'n v. Coleman,* 533 F.2d 434, 445 (9th Cir. 1976).

Congress, in enacting ANILCA, determined that previous environmental statutes and the executive branch were not providing sufficient protection for Native Alaskans' subsistence needs. *See Gambell,* 746 F.2d at 580. Title VIII of ANILCA was passed to remedy that lack of protection. It contains strong findings and policy statements favoring subsistence. ANILCA §§ 801, 802. In addition, Congress required that subsistence be considered prior to any public land disposition. *Id.* § 810; *See* S. Rep. No. 96-413, 96th Cong., 1st Sess. 234 (1979)(requirements of § 810 must be incorporated into land use planning process). This court must assume that, in passing Title VIII, Congress intended to alter the manner in which public decisions regarding land dispositions occurred. To assume otherwise would be to assume Congress intended a useless act. *See, e.g., Jackson v. Kelly,* 557 F.2d 735, 740 (10th Cir. 1977). Since the Secretary did not have the mandate of ANILCA clearly in mind, as was the case here, he could not have performed the lease sale evaluations in the manner Congress intended.

IV. *Findings of No Significant Restriction*

Plaintiffs also allege that the Secretary violated ANILCA in failing to follow the notice, hearing, and finding requirements of § 810(a)(1)-(3). Those requirements must be followed whenever the agency concludes that the proposed action "may significantly restrict subsistence uses." *Kunaknana,* 742 F.2d at 1151. The defendants argue that the lease sales did not significantly restrict subsistence in that the actions would cause no or only "slight" disruptions in user resources or access to resources. *See id.*

Defendants and defendant-intervenors further argue that the Secretary does not need to consider the impact of the lease's development and production phases in making this determination. The Ninth Circuit has held otherwise. In *Kunaknana* it stated:

> [8] We find that the agency examined the relevant factors and did not err in its judgment. The district court's decision includes findings of fact which evidence an articulated rational connection between the facts found [by the agency] and the choice made. *Id. See* CR 111 (Decision of Record). *The agency's decision-making process included the cumulative impacts of both the entire expedited leasing program and Lease Sale 831. This is evidenced by the fact that the agency removed certain lands, such as Caribou calving areas and Black Brant molting areas, from potential leasing and included stipulations regarding subsistence use in the leases.* The agency imposed these protective lease conditions and stipulations in order to preclude *future* restrictions on subsistence uses that might be caused by activity permitted by the NPRA-A leasing program.

Id. (emphasis added). Implicit in the above passage is the holding that ANILCA requires consideration of the "entire . . . leasing program," including development, at the lease stage.

In order to assure that procedural environmental statutes are implemented to the fullest extent possible, it is important that all environmental consequences be considered as early in the process as is meaningfully possible. *See Village of False Pass v. Watt,* 565 F. Supp. 1123, 1135-36, 1145 (D. Alaska 1983), *aff'd,* 733 F.2d 605 (9th Cir. 1984). As the court stated there:

> I note, however, that consideration at the leasing stage of potential or anticipated environmental consequences relating to exploration, development and

> production activities serves a number of important objectives. The inclusion into a leasing stage environmental impact statement of known environmental information relating to later exploration or development activities which may in some way bear significant relationship to the leasing decision or to the preliminary activities serves to alert the Secretary to any environmental consequences which may be irreversible. Information relating to potential or anticipated environmental consequences may also focus on the need to develop further information necessary for adequate discussion and consideration in an exploration or development and production environmental impact statement. Finally, the legislative scheme providing for several administrative decisions along the progression from leasing through production should not unnecessarily weaken the legislative objectives underlying the National Environmental Policy Act, the Endangered Species Act, the Marine Mammal Protection Act, or other acts serving to protect the environment. On the other hand, although known environmental consequences relating to a later stage ought to be included in a leasing stage environmental impact statement, it is not necessary to include information about environmental consequences which are conjectural or speculative, and will remain so until exploration or development.

Id. at 1145. *Accord. North Slope Borough v. Andrus*, 642 F.2d 589, 608 (D.C. Cir. 1980). ANILCA, like the Endangered Species Act and NEPA, therefore requires that development and production impacts be addressed at the lease stage. To segment the lease sale process, as defendants suggest, would thus run counter to the process required for effective environmental review. *See also Thomas v. Peterson*, 753 F.2d 754, 759-60 (9th Cir. 1975) (requiring early consideration of environmental impacts in

multi-phase project); *Village of False Pass v. Watt*, 733 F.2d 605, 608-09 (9th Cir. 1984) (ESA applies at lease stage).

Secretary of the Interior v. California, 104 S. Ct. 656 (1984), does not counsel to the contrary. The Supreme Court in that case ultimately depended on the unique statutory language and legislative history of OCSLA and the CZMA. Given that the court held that the ESA and NEPA continued to apply at the lease stage, it is probable that the court's holding was limited to the issue before it. *Id.* at 670. *See also* 43 U.S.C. § 1346(a), (d) (requiring study of environmental impacts prior to leasing).

A. *Lease Sale 57*

In preparation for this litigation, the Minerals Management Service prepared an ANILCA § 810 "signjficant restriction" study. In this study, the MMS found that the lease and exploration stages will not significantly restrict subsistence, but the development and production "may significantly restrict subsistence uses in certain areas" if oil is discovered. *See* Def. Ex. A at 3. Given that the agency found a significant restriction on subsistence may occur, the notice, hearing and findings requirement of § 810(a)(1)-(3) are triggered. The failure of the agency to follow those procedures is a violation of ANILCA. *See* 5 U.S.C. § 706(2)(A) & (D).

B. *Lease Sale 83*

In the FEIS prepared for Sale 83, the Secretary specifically found that for the lease sale, including development and production, "[i]mpacts on subsistence patterns from the proposal are negligible to nonexistent." FEIS at IV-84. Plaintiffs challenge this finding on the grounds that this conclusion is inconsistent with other findings in the FEIS and Secretarial Issue Document (SID). Elsewhere, the FEIS states:

> Pinnipeds breeding, migrating, and molting in the lease area when ice is present could experience

> substantial losses from oilspills or disturbance. Walrus, and perhaps ribbon seals could experience moderate regional effect. . . .

Id. at IV-42. The FEIS also noted that under a worst case analysis, "one third of the entire bowhead whale population could be exposed to adverse effects." *Id.* at IV-65.

The conclusion of no significant restriction, in face of the above findings, is not arbitrary and capricious. *See Kunaknana,* 742 F.2d at 1151 (stating standard of review).[1] The worst case analysis is speculative, and given the continuing requirements of the Endangered Species Act and Secretarial control over leasing, highly unlikely to occur. Any "moderate" effect on the walrus population is equally unlikely to effect subsistence, given the current abundance of the species. FEIS at IV-83. The court finds the Secretary considered the relevant factors and there was not a clear error of judgment.

V. *Appropriate Remedy*

Absent unusual circumstances, an injunction is the appropriate remedy for the violation of a procedural environmental statute, such as ANILCA § 810. *Thomas v. Peterson,* 753 F.2d 754, 764 (9th Cir. 1985). Irreparable harm is presumed to flow to plaintiff by reasons of the violation. *Id.; Save Our Ecosystems v. Clark,* 747 F.2d 1240, 1250 (9th Cir. 1984). Nevertheless, in unusual circumstances, an injunction may be inappropriate. *Forelaws on Board v. Johnson,* 743 F.2d 677, 686 (9th Cir. 1984); *State of Alaska v. Andrus,* 580 F.2d 465, 485-87 (D.C. Cir. 1978).

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[1] Plaintiffs' do not argue here that the Secretary's determination of "significant restriction" should be reviewed under the "rule of reason" and accordingly this court, like the *Kunaknana* court, does not reach the issue of whether arbitrary and capricious or the "rule of reason" is the correct standard of review. *Cf. Foundation for North American Wild Sheep v. United States Dept. of Agriculture,* 681 F.2d 1172, 1177 n.24 (1982) (applying "rule of reason" under NEPA).

The Court finds in the instant case:

(1) That delay in the exploration of the OCS may cause irreparable harm to this nation's quest for new oil resources and energy independence. Expedited exploration as a policy is stated in OCSLA. *See* 43 U.S.C. § 1332(3);

(2) That exploration will not significantly restrict subsistence resources; and

(3) That the Secretary continues to possess power to control and shape the off-shore leasing process. Therefore, if the ANILCA subsistence studies require alteration of the leasing conditions or configuration the Secretary will be able to remedy any harm caused by the violation.

Applying the traditional test for preliminary injunction the court finds:

(1) Movants have established a strong likelihood of success on the merits;

(2) The balance of irreparable harm does *not* favor the movants;

(3) The public interest favors continued oil exploration, for the reason that the national interest favors OCS oil exploration and such exploration will not cause the type of harm, a restriction in subsistence uses or resources, that ANILCA was designed to prevent.

Based on the above the court finds an injunction preventing oil exploration is inappropriate under the facts of this case.

Accordingly, IT IS ORDERED:

THAT plaintiffs' motion for preliminary injunction is denied.

DATED at Anchorage, Alaska, this 23rd day of May, 1985.

BY ORDER OF THE COURT:

JAMES A. VON DER HEYDT
UNITED STATES DISTRICT JUDGE

Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 83-3735X
83-3781
D.C. No. 83-003

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND THE PEOPLE OF THE VILLAGE OF STEBBINS, AN ALASKAN NATIVE IRA ASSOCIATION, PLAINTIFFS-APPELLANTS,

v.

WILLIAM CLARK*, SECRETARY OF THE INTERIOR, AND U.S. DEPARTMENT OF THE INTERIOR, DEFENDANTS-APPELLEES.

AND ARCO ALASKA, INC., ET AL., DEFENDANTS-APPELLEES.

OPINION

Appeal from the United States District Court for the District of Alaska James A. von der Heydt, District Judge, Presiding Argued and Submitted October 7, 1983

Before: BROWNING, Chief Judge, HUG, Circuit Judge, and REED**, District Judge.

BROWNING, Chief Judge:

The appellee Secretary of Interior offered to sell leases for about 2.4 million acres of land in the Norton Sound

*William Clark is substituted for James G. Watt as Secretary of the Interior pursuant to Fed. R. App. P. 43(c).

**Honorable Edward C. Reed, Jr., United States District Judge, District of Nevada, sitting by designation.

Basin off the western shore of Alaska for oil and gas exploration under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356. Appellee oil companies submitted bids for these leases. Appellants, the People of the Village of Gambell and the People of the Village of Stebbins (Alaska Native Indian Reorganization Act Associations composed of residents of two towns on Norton Sound) brought this action to enjoin the sale. The district court denied appellants' motion for preliminary injunction and granted the Secretary's motion for summary judgment. This appeal followed.

Appellants argue that oil and gas development without their consent is barred because it will adversely affect their aboriginal right to subsistence hunting and fishing. Alternatively, they contend the lease sale failed to satisfy the procedural requirements of section 810 of the Alaska National Interest Lands Conservation Act (Conservation Act), 16 U.S.C. § 3120, providing special protections for subsistence uses in Alaska.

The district court held that neither appellants' aboriginal hunting and fishing right nor section 810 of the Conservation Act extend to waters over the outer continental shelf outside the territorial boundaries of the State of Alaska.

We hold that if appellants had an exclusive aboriginal right to hunt and fish in offshore areas adjacent to Alaska, that right was extinguished by the Alaska Native Claims Settlement Act (Claims Settlement Act), 43 U.S.C. §§ 1601-1628.[1] We further hold, however, that section 810

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[1] We assume rather than deciding that appellants had an aboriginal right to hunt and fish in the waters of Norton Sound above the lands involved in the lease-sale. Since we conclude any such rights were extinguished by the Claims Settlement Act, we also do not decide whether they would be extinguished by the Outer Continental Shelf Lands Act as well.

of the Conservation Act does apply to outer continental shelf waters in Norton Sound, and remand to the district court for determination of the proper remedy.

I.

Appellants argue that oil and gas exploration and development in Norton Sound conflicts with their asserted aboriginal right to hunt and fish in these waters and concomitant right to the minerals of the outer continental shelf underlying the Sound.

Aboriginal title or right is a right of exclusive use and occupancy held by Natives in lands and waters used by them and their ancestors prior to the assertion of sovereignty over such areas by the United States. These rights are superior to those of third parties, including the states, but are subject to the paramount powers of Congress. *See Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661, 667-69 (1974); *United States* v. *Santa Fe Pacific R.R.,* 314 U.S. 339, 345 (1941). Aboriginal rights based on occupation and use are entitled to the protection of federal law even when they are not formally recognized as ownership by treaty or statute, *Santa Fe,* 314 U.S. at 347, but such unrecognized aboriginal rights can be extinguished by Congress without compensation. *See Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, 279-85, 288-89 (1955); *United States* v. *Dann,* 706 F.2d 919, 922 n.1 (9th Cir. 1983), *cert. granted,* ____ U.S. ____, 104 S. Ct. 2693 (1984); *Wahkiakum Band v. Bateman,* 655 F.2d 176, 180 (9th Cir. 1981); *United States* v. *Atlantic Richfield Co.,* 612 F.2d 1132, 1134 (9th Cir. 1980). Congress's intention to extinguish must be clear; it will not be lightly implied. *See United States* v. *Santa Fe Pacific R.R. Co.,* 314 U.S. 339, 354 (1941); *United States* v. *Dann,* 706 F.2d at 928-29; *United States* v. *Gemmill,* 535 F.2d 1145, 1147 (9th Cir. 1976).

Appellees argue the Claims Settlement Act extinguished whatever aboriginal rights the Natives may have held in Norton Sound. The Claims Settlement Act arose out of a series of events beginning with passage of the Alaska Statehood Act in 1958. When Alaska became a state, nearly all its territory was federal land. The Statehood Act granted the new state the right to select over 100 million acres for state ownership. However, the state agreed by section 4 of the act to "disclaim all right and title . . . to any lands or other property (including fishing rights) [of Alaska Natives]. . . ." Pub. L. 85-508, 72 Stat. 339, 339 (1958). The state selected large areas of federal land and made application for patents for the land. The Natives claimed aboriginal title to much of the same territory. The discovery of oil on the North Slope in the 1960's exacerbated this conflict. These conflicting claims hindered both development and protection of Native and national interests in Alaska. In 1966 Secretary of Interior Stewart Udall "froze" all public land transactions in Alaska pending resolution of the conflicting claims. In 1971 Congress passed the Claims Settlement Act in an effort to accommodate in a rational manner the interests of the state, Native groups, conservationists, and potential developers, including the oil companies. *See generally,* H.R. Rep. No. 1045, 95th Cong., 2d Sess., pt. I at 188-89 (1978); S. Rep. No. 405, 92d Cong., 1st Sess., pt. I at 71-78 (1971).

The heart of the Claims Settlement Act was the extinguishment of Native claims based on aboriginal right in return for a grant to the Natives of $962,500,000 and 40,000,000 acres of land. *United States* v. *Atlantic Richfield,* 612 F.2d 1132, 1134 (9th Cir. 1980). Unquestionably it was the purpose of the Claims Settlement Act to extinguish the aboriginal claims of Alaska Natives.[2] The

[2] "Native" is defined in the Act as "a citizen of the United States who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or combination thereof." 43 U.S.C. § 1602(b).

question is whether the extinguishment provision applies to lands on the outer continental shelf adjacent to the Alaskan land mass and to waters over such lands.

Our inquiry begins with the statutory language. The critical language is found in Section 4(b) of the Act, 43 U.S.C. § 1603(b):

> All aboriginal titles, if any, and claims of aboriginal title *in Alaska* based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished. (emphasis added).

The statute also states: "there is an immediate need for a fair and just settlement of all claims by Natives . . . based on aboriginal land claims," and "the settlement should be accomplished rapidly, with certainty, [and] . . . without litigation. . . ." 43 U.S.C. § 1601(a), (b).

The argument that aboriginal title in outer continental shelf lands and waters is not extinguished rests entirely upon use in section 4(b) of the phrase "in Alaska" to identify the location of the titles and claims of title to be extinguished.

We believe Congress used the phrase "in Alaska" in this context to mean the geographic region, including the contiguous continental shelf and the waters above it, and not merely the area within the strict legal boundaries of the State of Alaska. This is not an uncommon usage. Indeed, the Norton Sound, at issue here, is described in *Webster's New Geographical Dictionary* (1972 ed.) as a "large inlet of NE Bering Sea, *in W Alaska*. . . ." (emphasis added). As indicated in Part II of this opinion, nine years later, when Congress adopted the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101-3233 (Conservation Act), to complete the land allocation process initiated by the Statehood and Claims Settlement Acts, Congress used the words "in Alaska" to refer to areas of the

outer continental shelf. Section 1001 of the Conservation Act, 16 U.S.C. § 3141, refers to "all Federal lands (other than submerged lands on the Outer Continental Shelf) in Alaska. . . ." During debates on the Conservation Act, the phrase "in Alaska" was used on numerous occasions to include the outer continental shelf. *See e.g.*, 125 Cong. Rec. 9900, 11,128 (1979) (statements of Rep. Udall); *id.* at 9907 (statement of Rep. Young).

The possibility of two meanings of the phrase "in Alaska" renders the provision ambiguous, justifying reference to the legislative history. That history makes it clear that Congress intended to extinguish aboriginal fishing and hunting rights in outer continental shelf waters contiguous to the State of Alaska.

Congress repeatedly enjoined those who were to implement the statute to interpret the extinguishment section broadly to accomplish a complete and final settlement of aboriginal claims and avoid further litigation of such claims.[3] Claims of aboriginal title to submerged lands,

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[3] Relevant statements from the legislative history are quoted in *United States* v. *Atlantic Richfield Co.*, 612 F.2d 1132, 1136 (9th Cir. 1980):

The House report stated,

> Section 4 extinguishes all aboriginal titles in Alaska, and all claims based thereon,

and

> The section extinguishing aboriginal titles and claims based on aboriginal title is intended to be applied broadly, and to bar any further litigation based on such claims of title.

H.R. Rep. No. 523, 92d Cong., 1st Sess. 6, 8 *reprinted in* [1971] U.S. Code Cong. & Ad. News 2196, 2198. The Senate report stated that the objective of the legislation was to avoid

> a myriad of lawsuits which cannot provide justice to any of the parties involved but which may be expected to increase the existing antagonisms between Native people and other Alaskans.

both inland and offshore, were expressiy included in the extinguishment provision, as were "any aboriginal hunting or fishing rights." The needs of the Natives for subsistence hunting and fishing were considered in determining the amount of land granted the Natives, *see, e.g.*, H.R. Rep. No. 523, 92nd Cong., 1st Sess. 5, *reprinted in* 1971 U.S. Code Cong. & Ad. News 2192, 2195; the land was granted, in part, "in lieu of subsistence hunting and fishing rights," 117 Cong. Rec. 36864 (1971) (Rep. McClure).[4]

S. Rep. No. 405, 92d Cong., 1st Sess. 73 (1971). The Conference Committee report[7] stated,

> It is the clear and direct intent of the conference committee to extinguish *all* aboriginal claims and *all* aboriginal land titles, if any, of the Native people of Alaska and the language of settlement is to be broadly construed to eliminate such claims and titles as any basis for any form of direct or indirect challenge to land in Alaska.

Conf. Rep. No. 40, *reprinted in* [1971] U.S. Code Cong. & Ad. News 2253 (emphasis in original).

The statements of former Justice Arthur Goldberg, attorney for the Alaska Federation of Natives, before Congress in 1969 also support the district court's conclusion. Goldberg, under questioning by Senator Stevens of Alaska, said, "The position that the Natives have taken is that they are prepared for an extinguishment of anything that is based upon aboriginal title." *Alaska Native Land Claims: Hearings on S. 1830 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 300-01 (1969).

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[7] The House and Senate Conference Reports are identical. S. Conf. Rep. No. 481, 92d Cong., 1st Sess. (1971); H.R. Conf. Rep. No. 746, 92d Cong., 1st Sess. (1971) [Hereinafter cited as Conf. Rep.]

[4] Rep. McClure, a member of the Committee on Interior and Insular Affairs, stated:

> . . . The settlement of this acreage of land is in lieu of other rights, and the bill in specific terms removes hunting and fishing rights. The subsistence lands that may be selected, after the

Appellants' claim of aboriginal title rests upon immemorial use for hunting and fishing extending far to sea. They assert:

> Factually, no aboriginal group has ever used water and ice as intensely as have the Eskimos. For about half the year, water up to 65 miles from the Arctic coast is frozen solid. The resulting ice areas resemble the tundra, and during this period the Eskimos treat the ice as a mere extension of the land. They set up camps on the ice. They build roads on it. And, most importantly, they hunt and fish on it. R. Nelson, *Hunters of the Northern Ice* (1969). . . . Eskimos have relied on the sea to provide them with most of their necessities. They have relied on the oceans to provide them with food, clothing, fuel, and the basic material for making hunting equipment such as kayaks and harpoons. *Id.*; N. Chance, *The Eskimo of North Alaska* 9 (1966).
>
> Because ice areas are not physically different from land during long periods of the year, and because Eskimos have generally relied on the oceans for most of their food, fuel, and clothing, they have not tradi-

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village lands are selected and after the statehood lands are selected, are in lieu of subsistence hunting and fishing rights, and the only hunting and fishing rights they will have are in connection with whatever lands are selected by them under the provisions of the bill.

* * *

. . . The rights for hunting and fishing will be not rights, but whatever is granted to them as a matter of charity or a matter of generosity on the part of the State or the Federal Government. I think we should know that is one of the reasons why the acreage that is granted is as large as it is.

Appellants are two of the villages qualified by section 1610(b) of the Act to receive land benefits under section 1613(a) and (b).

> tionally recognized sharp distinctions between land and water. Simply stated, the sea is so central to the life of an Eskimo that s/he recognizes no distinctions between the two. . . . K. Josephson, *Alaska and the Law of the Sea: Use of the Sea by Alaska Natives—A Historical Perspective,* 91 (1974).

Appellants' Opening Brief 27-8. Appellees do not dispute this assertion.

The Final Environmental Impact Statement (FEIS) for the Norton Sound lease sale describes the subsistence way of life as a "continuation of traditional patterns continuous for several centuries." United States Department of Interior, Final Environmental Impact Statement, OCS Proposed Oil & Gas Lease Sale Norton Sound 47 (1982). *See also id.* at xii (subsistence activities "passed on through countless generations."). The Natives' dependence on hunting, whaling, and fishing extending 20-30 miles off shore is described in detail for each of the affected villages. *Id.* at 47-53 & Graphics 2A, 2B, 2C.

Congress could not have been unaware of such widely known facts of Native Alaskan life and appellants do not argue to the contrary. Mr. Eben Hopson, a witness from Point Barrow, Alaska, reminded the Senate Interior and Insular Affairs Committee: "As far as hunting on the sea is concerned that is continually being used on a year around basis by the Eskimo people, and the same holds true wherever you find an Eskimo village along the coast." *Alaska Native Land Claims: Hearings on S. 1830 Before Senate Comm. on Interior and Insular Affairs,* 91st Cong., 1st Sess., pt. II at 335 (1969) [hereinafter *Senate Hearings 1969*]. *See also Alaska Native Land Claims: Hearings on H.R. 13142, H.R. 10193 and H.R. 14212 Before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs,* 91st Cong., 1st Sess., pt. II at 401-02 (1969) [hereinafter *House Hearings 1969*]; *Alaska Native Land Claims: Hearings on S. 35, S. 835 and S. 1571*

Before the Senate Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess., pt. I at 168, 345 (1971) [hereinafter *Senate Hearings 1971*].

Aboriginal fishing and hunting rights are precisely the kind of rights Congress wished to extinguish. Nothing in the legislative history suggests that Congress intended to extinguish such rights in ocean waters within three miles of land but preserve them in the waters beyond. On the contrary, the only directly pertinent legislative material strongly suggests Congress intended to extinguish aboriginal fishing rights in outer continental shelf waters as well.

Early versions of the Act contained no reference to either offshore lands or fishing and hunting rights. *See* S. 2906, 90th Cong. 2d Sess. § 501 (1968) (extinguishing "all claims against the United States based upon aboriginal right, title, use, or occupancy of lands in Alaska. . . ."); S. 1830, 91st Cong., 1st Sess. § 3(a) (1969) (similar language). During Senate hearings in 1969 John Pickering, representative of the Western Oil and Gas Association, pointed out that some of the Native claims "purport to cover waters in addition to land areas" and "to effectuate a complete settlement, the claims should be extinguished as to water, as well as to land, areas." Mr. Pickering suggested this was true "for submerged areas beneath navigable waters in particular," and identified these as including "submerged areas beneath navigable waters [title over which was vested] in the State of Alaska under the grant made to it by the Submerged Lands Act (67 Stat. 29) as made applicable by the Statehood Act (72 Stat. 343), *or in the United States under the Outer Continental Shelf Lands Act* (67 Stat. 462)." *See Senate Hearings 1969, supra,* pt. I at 140, 144, 149 (emphasis added). "In view of this," Mr. Pickering stated, "it would be unfortunate if the legislation overlooked settling the Native claims to waters and thereby left open the possibility that such claims might

be asserted to water areas in the future." *Id.* at 144. To include such areas, Mr. Pickering suggested the extinguishment provision be amended to apply to claims based on use or occupancy not only of lands but also of "waters, and submerged areas in Alaska." *See id.* at 149. The State of Alaska recommended the same language. *See id.*, pt. II at 241. The present language of Section 4 ("including submerged lands underneath all water areas both inland and offshore") was inserted in Senate bills following this hearing.

These events strongly suggest that the reference to "submerged lands" was intended to include lands on the outer continental shelf contiguous to Alaska, and that the general reference to Alaska (as distinguished from the State of Alaska) was not regarded as confining the reach of the extinguishment provision to the three-mile limit.

The express reference in Section 4(b) to "aboriginal hunting or fishing rights" probably also had its genesis in the hearings before the 91st Congress. Arthur J. Goldberg, former Justice of the Supreme Court, appeared before the Senate Committee on behalf of the Alaska Federation of Natives, principal representative of the Natives before Congress. Senator Stevens of Alaska asked Mr. Goldberg whether the Natives agreed that aboriginal fishing and hunting rights should be extinguished. After a rather confusing exchange, Senator Stevens said:

> [W]e are talking about a bill to settle the property claims of the Alaska Native people, not just the land claims, a bill to settle the property rights, including land, and I hope that this bill will be viewed in that manner because I would not want to have to come back here a few years from now and try to get a bill to settle the nonland property claims.

Senate Hearings 1969, supra, pt. II at 299-301. Mr. Goldberg replied:

> The position that the Natives have taken is that they are prepared for an extinguishment of anything that is based upon aboriginal title.

Id. at 301. The Alaska Federation of Natives further clarified Mr. Goldberg's response in a supplemental statement which agreed that the settlement should extend to all claims "founded upon aboriginal title or use and occupancy of lands, including claims relative to fishing rights. . . ." *Id.*

During these same hearings, the National Wildlife Federation suggested the bill be strengthened by adding "including any aboriginal hunting or fishing rights that may exist" to the extinguishment provision. *Id.* at 526. This phrase was added without change to the Senate bill and eventually included in the version of the act adopted by Congress.

These witnesses presented similar testimony before the House Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs. The representatives of the Alaska Federation of Natives (AFN) reiterated their view that the act should be a "full and final extinguishment of any and all claims against the United States based upon aboriginal right. . . ." *See House Hearings 1969,* Pt. I, *supra,* at 52. *See also id.* at 265-68. The Governor of the State of Alaska and the representatives of the Western Oil and Gas Association repeated their urgings that the extinguishment section address claims to waters and submerged areas. *See id.* at 138, 154, 310, 312-13, 318. And the National Wildlife Federation recommended to the House Committee addition of the identical phrase to cover aboriginal hunting and fishing rights that it suggested to the Senate Committee. *Id.* at 292.

No legislation passed the 91st Congress, but bills introduced in the 92d Congress reflected this testimony. At least one Senate bill specifically extinguished claims to offshore areas and hunting and fishing rights with language

essentially identical to the present section 4(b). *See* S. 35, 92d Cong., 1st Sess. § 4(a) (1971). Similar language in a House bill referred to "alleged aboriginal hunting and fishing rights that may exist." *See* H.R. 3100, 92d Cong., 1st Sess. § 3(b) (1971).

Only brief hearings were conducted by the House and Senate committees on these and other bills in 1971. Representatives of the Western Oil and Gas Association urged the Senate and House to approve bills with extinguishment sections referring to water, offshore areas, and hunting and fishing rights and criticized bills that failed to include specific language extinguishing such claims. *See Senate Hearings 1971 supra,* pt. II at 578, 581, 583; *Alaska Native Land Claims: Hearings on H.R. 3100, H.R. 7039, and H.R. 7432 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs,* 92d Cong., 1st Sess. 353, 354, 356-57 (1971) [hereinafter *House Hearings 1971*]. The AFN explained before the Senate Committee that its position "on the major provisions of the settlement, as well as most of the details, remains virtually the same as it was in our prior appearances before this committee." *Senate Hearings 1971, supra,* pt. I at 306. The National Wildlife Federation stated again its belief that the settlement should extend to "hunting, fishing, and trapping rights." *Id.* at 386. *See also House Hearings 1971, supra,* at 342.

The Senate passed a bill containing an extinguishment section referring to offshore submerged lands and to hunting and fishing rights. Submerged offshore areas were not specifically extinguished in the House-passed bill, but aboriginal hunting and fishing rights were. The conference committee adopted the broader and more explicit language of the Senate bill, stating the language was "in substance, the same as the language of the Senate amendment." H. Conf. Rep. No. 746, 92d Cong., 1st Sess. 40, *reprinted in* 1971 U.S. Code Cong. & Ad. News, 2247, 2253.

This summary of the history of section 4(b) demonstrates that Congress chose to adopt broad language to extinguish all claims made by Alaska Natives based upon aboriginal right, specifically including claims to hunting and fishing rights in offshore waters above the outer continental shelf.

Based upon the language of section 4(b) of the Claims Settlement Act, taken as a whole, the mandate from Congress to construe the provision broadly to extinguish all aboriginal claims, and the legislative history indicating a specific purpose to extinguish aboriginal hunting and fishing rights, including those in coastal waters, and specifically in outer-continental-shelf waters, we conclude that appellants' claims to an aboriginal right to hunt and fish in Norton Sound were extinguished.

II.

We turn to appellants' contention that the lease sale failed to satisfy the procedural requirements of section 810 of the Alaska National Interest Lands Conservation Act (Conservation Act), 16 U.S.C. § 3120, a claim rejected by the district court on the ground that this statutory provision does not apply to the outer continental shelf.

Title VIII of the Conservation Act, of which section 810 is a part, seeks to preserve the opportunity of rural residents of Alaska to take fish and wildlife for their subsistence. As one means of furthering this purpose, section 810 provides that in determining whether to lease or otherwise permit the disposition of public lands the head of the federal agency having primary jurisdiction of such lands shall evaluate the effect of the proposed action on subsistence uses. No action is to be taken which would significantly restrict subsistence uses unless the head of the agency first satisfies certain procedural conditions, including notice and hearing, and determines that the proposed restriction of subsistence uses is necessary, that the minimal amount of "public lands" are involved, and that

reasonable steps have been taken to minimize the adverse impact on subsistence uses.

Section 810 applies to "public lands." The term "land" is defined as "land, waters, and interests therein." Section 102(1), 16 U.S.C. § 3102(1). The term "public lands" is defined as "land situated *in Alaska.*" Section 102(3), 16 U.S.C. § 3102(3) (emphasis added). As in the construction of the Claims Settlement Act, the question in construing the Conservation Act is whether the limitation "in Alaska" in this definition of "public lands" excludes the outer continental shelf and its covering waters. Our conclusion is the same under both statutes: outer continental shelf lands and waters contiguous to the State of Alaska are included.

As we have said, a geographic term such as "in Alaska" may be used in either a general or technical sense, and reference to the legislative history to resolve the ambiguity is appropriate. *See Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78, 89 (1918).

During the House debates the term "in Alaska" was used in its general sense. Representative Morris K. Udall, Chairman of the House Committee on Interior and Insular Affairs, and manager of the bill on the floor, referred to outer continental shelf lands as "in Alaska." 125 Cong. Rec. 9900, 11,128 (1979). So too did Representative Don Young of Alaska, a member of both the Interior Committee and the Subcommittee on General Oversight and Alaska Lands. *See id.* at 9907. Other congressmen referred to "Alaska's" oil resources in terms that necessarily included oil reserves beneath the outer continental shelf. *See id.* at 11,174 (Rep. Huckaby); *id.* at 9893 (Rep. Vento).

In addition to this support for a nontechnical usage of the phrase "in Alaska" to include the outer continental shelf lands and waters, the record of legislative consideration of the Conservation Act contains convincing evidence that Congress intended to include these areas within the reach of section 810.

Appellants make a compelling argument that the provisions of Title VIII of the Conservation Act protecting subsistence uses were intended to have the same territorial scope as provisions of the earlier Claims Settlement Act extinguishing Native hunting and fishing rights. The two statutory provisions are clearly related. When Congress adopted the Claims Settlement Act it was aware that extinguishing Native rights might threaten subsistence hunting and fishing by Alaska Natives. The Senate version of the Claims Act included provisions directing the Secretary to protect subsistence uses on public lands. The Conference Committee eliminated this provision, but the Committee made it clear that it did so only because it concluded subsistence resources should be protected by the Secretary of Interior through the exercise of existing administrative authority. The Committee wrote: "The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives." *See* H. Conf. Rep. No. 746, 92d Cong., 1st Sess. 37, *reprinted in* 1971 U.S. Code Cong. & Ad. News 2247, 2250. Title VIII of the Conservation Act was enacted because the Secretary and the state failed to heed Congress's admonition. *See* S. Rep. No. 413, 96th Cong., 1st Sess. 230-31, *reprinted in* 1980 U.S. Code Cong. & Ad. News, 5070, 5174-75; S. Rep. No. 1300, 95th Cong., 2d Sess. 195-96 (1978); H.R. Rep. No. 1045, 95th Cong., 2d Sess., pt. I at 183-84 (1978); 126 Cong. Rec. 29278 (1980) (Cong. Udall); 125 Cong. Rec. 9904 (1979) (Cong. Udall). It is a reasonable assumption that Congress intended the preference and procedural protections for subsistence uses mandated by Title VIII of the Conservation Act to be co-extensive with the extinguishment of aboriginal rights that made those measures necessary.

Congress's intention to protect subsistence uses by rural residents of Alaska is repeatedly and strongly stated in the

statute itself. It was a stated general purpose of the Conservation Act "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." Section 101(c), 16 U.S.C. § 3101(c). Congress found that continuation of the opportunity of rural Alaskans to make subsistence use of fish and wildlife "is essential to [their] existence." Section 801(1), 16 U.S.C. § 3111(1). Congress further found that "to fulfill the policies and purposes of the [Claims Settlement Act] and as a matter of equity, it is necessary . . . to protect and provide the opportunity for continued subsistence uses on the public lands. . . ." Section 801(4), 16 U.S.C. § 3111(4). It is Congress's stated policy that "utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands. . . ." Section 802(1), 16 U.S.C. § 3112(1). The stated purpose of Title VIII in particular "is to provide the opportunity for rural residents engaged in a subsistence way of life to do so." *Id.*

Congressional reports and debates echo these views.[5] It is clear Congress's concern included all rural Alaskans,[6] and, as we have seen, reliance by coastal villagers upon hunting and fishing in waters and on the ice over the outer continental shelf was well known.[7] In strikingly similar

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[5] *See, e.g.*, S. Rep. No. 413, 96th Cong., 1st Sess. 230-33, 267-68, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, 5174-77, 5211-12; S. Rep. No. 1300, 95th Cong., 2d Sess. 195-96 (1978); H.R. Rep. No. 1045, Pt. I., 95th Cong., 2d Sess. 181-84, 187 (1978); 126 Cong. Rec. 29,278 (1980); 125 Cong. Rec. 9904-05 (1979).

[6] *See* S. Rep. No. 413, 96th Cong., 1st Sess. 268-69, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, 5212-13; S. Rep. No. 1300, 95th Cong., 2d Sess. 220 (1978); 126 Cong. Rec. 29278-79 (Cong. Udall).

[7] See pp. 6-8, *supra*. *See also Inclusion of Alaska Lands in National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems, Hearings on H.R. 39, H.R. 1974, H.R. 2876, H.R. 5505, et al., H.R. 1454, H.R. 5605, & H.R. 8651, Before the Subcommittee on General Oversight and Alaska Lands of the House Committee on Interior and*

circumstances, the Supreme Court has twice given an expansive and non-technical interpretation to geographical terms to achieve Congress's apparent purpose to protect native fisheries. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 110-16 (1949); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918).

There are other indications of a Congressional intent that section 810 apply to outer continental shelf waters. For example, as originally proposed the subsistence provisions applied only to lands in conservation units established by what are now Titles II through VII of the Conservation Act. *See* H.R. 39, § 701(a), (b), 95th Cong., 1st Sess. (1977). The boundaries of these units were fixed by maps to be approved with the legislation, *see id.* § 1(c), and generally would not have included outer continental shelf areas. In the course of legislative proceedings, the coverage of Title VIII was extended beyond the boundaries of the conservation units to include all public lands in Alaska. *See* 16 U.S.C. §§ 3102(3), 3111, 3112. The boundaries of conservation units remained tied to maps, as they are in the Act as passed. *See* 16 U.S.C. § 3103(a). At the same time, Congress amended the savings clause, 16 U.S.C. § 3125, identifying existing statutes that were not to be considered modified or replaced by the passage of Title VIII, to include the Fishery Conservation and Management Act of 1976, in which the United States asserts exclusive jurisdiction over a fishery conservation zone that extends 200 miles offshore.[8] *See* 16 U.S.C. § 1811-12. Although other explanations may be possible, this change suggests Congress understood that Title VIII applied to outer continental shelf waters.

Insular Affairs, 95th Cong., 1st Sess., pt. XIII at 468, 484, 487, 510-528 (1977) (report discussing Arctic Slope subsistence uses of resources of the ocean and sea ice).

[8] *Compare* H.R. 39, § 701(g), 95th Cong., 1st Sess. (Comm. Print Oct. 12, 1977) *with* H.R. 39, as amended, § 713, 95th Cong., 2d Sess. (1978).

A second example: At least one of the national wildlife refuges created by the Conservation Act (the Yukon Delta National Wildlife Refuge) has within its borders portions of the outer continental shelf and overlying waters. *See* 48 Fed. Reg. 7890, 8017 (Feb. 24, 1983). Unless these lands and waters are included in Title VIII the protection that title provides for subsistence uses would not apply to the entire Wildlife Refuge though one of the specified purposes of the Refuge is "to provide . . . the opportunity for continued subsistence uses by local residents." *See* Conservation Act, Pub. L. No. 96-487, § 303(7)(B)(iii), 94 Stat. 2371, 2392.

The most compelling reason for resolving the ambiguous language of Title VIII in favor of coverage of outer continental shelf lands and waters is that Title VIII was adopted to benefit the Natives. Under a familiar rule of statutory construction doubtful language should be construed to further that purpose. *See Alaska Pacific Fisheries* v. *United States,* 248 U.S. at 89; *United States* v. *Dann,* 706 F.2d 919 at 931, quoting *United States* v. *Santa Fe Pacific R.R.,* 314 U.S. 339, 353-54 (1941); *Puyallup Indian Tribe* v. *Port of Tacoma,* 717 F.2d 1251, 1257 n.6 (9th Cir. 1983). Congress was specifically advised that this rule of construction would be applied to Title VIII and other subsistence provisions though not to the rest of the Act. In the course of a detailed discussion of the proposed legislation submitted to the House, Congressman Udall said with specific reference to Title VIII:

> While the [Conservation Act] obviously is not Indian legislation in its entirety, the subsistence title and the other subsistence related provisions are. And under well-recognized canons of statutory construction, any ambiguities in the title and other provisions must be resolved in favor of the Alaska Native people.

> This result is also consistent with the Congressional policy established by section 802(1) that the management of the public lands shall cause the least adverse impact possible on rural residents who depend upon subsistence uses.

126 Cong. Rec. 29,279 (1980). *See also* 125 Cong. Rec. 9904 (1979).

As appellees have demonstrated, reasonable arguments can also be made for a narrow construction of section 810. We find them unpersuasive, however, in light of the evidence of a contrary legislative intent and the admonition that ambiguities in Title VIII "must be resolved in favor of the Alaska Native people."

Appellees rely particularly upon reference to the Conservation Act as a "land bill" that would not inhibit development of oil and gas resources on the outer continental shelf. *See e.g.*, 125 Cong. Rec. 11,128 (1979) (statement of Rep. Udall); *id.* at 11,170 (statement of Rep. Emery). These statements were made in response to arguments that the Conservation Act "locked up" Alaskan resources. The statements did not refer to Title VIII but rather to Titles II-VII which add lands to the National Park System and other conservation units. Oil and gas exploration and production in fact would be precluded in some of these conservation units and probably in others. Congressmen Udall and Emery were making the point that these conservation units did not include the adjacent outer continental shelf and therefore creation of such units did not preclude oil and gas development on the shelf. *See also* S. Rep. No. 413, 96th Cong., 1st Sess. 417, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 5357.

These statements are not inconsistent with the position that Title VIII includes the outer continental shelf since nothing in Title VIII precludes oil and gas development in the areas to which it applies. The only restrictions imposed by section 810 are procedural ones. Once these are com-

plied with, "the head of the appropriate Federal agency may manage or dispose of public lands under his primary jurisdiction for any of those uses or purposes authorized by this Act or other law." Section 810(d), 16 U.S.C. § 3120(d). In the words of the Senate Report: "[O]nce the requirements of the section are satisfied and incorporated into existing land use planning processes the proposed action may proceed even though its effect may be adverse to subsistence uses." S. Rep. No. 413, 96th Cong., 1st Sess. 234, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 5178.[9]

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[9] The response to other arguments against a broad interpretation of section 810 may be stated briefly.

Rejection by Congress of proposals to extend the coverage of conservation units to areas beyond the territorial sea, (*See, e.g.*, S. Rep. No. 1300, 95th Cong., 2d Sess. 149-50 (1978); 124 Cong. Rec. 18025-27 (1978)) is not relevant to the interpretation of Title VIII for the reason mentioned: inclusion in a Title II-VII conservation unit might bar future development, but inclusion in Title VIII would not. Moreover, the "complexity of jurisdictions" that would have resulted from extension of conservation units seaward, *id.*, would not occur under Title VIII since this title contemplates administration of both state and federal lands by the state for the purpose of this section (§ 805(d), 16 U.S.C. § 3115(d)). *See also* 126 Cong. Rec. 29280 (1980).

Other federal statutes applicable in one fashion or another to resource management on the outer continental shelf are neither so comprehensive nor inconsistent with Title VIII as to support an inference that Title VIII does not apply to these areas. Section 810(b) provides expressly for situations in which both Title VIII and the National Environmental Protection Act, 42 U.S.C. § 4321, *et seq.*, will be applicable. Other statutes of general applicability mentioned by appellees (the Endangered Species Act, 16 U.S.C. § 1531-43; the Coastal Zone Management Act, 16 U.S.C. §§ 1451-54; and the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-56) pursue different goals by different means than Title VIII of the Conservation Act, and may be applied consistently with Title VIII.

Appellees argue that subjecting outer continental shelf lands and waters to certain provisions of the Act other than Title VIII in which the term "public lands" is used would provide "absurd and unintended

We conclude that the ambiguous language of the Conservation Act should be interpreted to include outer continental shelf lands and waters within the coverage of section 810.

III.

Appellants ask that the lease sale be voided because the Secretary has not complied with the requirements of section 810. Appellees contend the Secretary has substantially complied with the requirements of the section, albeit acting under other statutes, and if he has not, the proper remedy is to maintain the status quo unless and until the Secretary complies with section 810, citing *California* v. *Watt,* 683 F.2d 1253, 1266 (9th Cir. 1983), *reversed on other grounds,* ____ U.S. ____, 104 S. Ct. 656 (1984).

These arguments raise factual and legal issues that have not been but should be considered initially by the district court.

Appellants' request for attorneys' fees is denied. Assuming appellants are prevailing parties we cannot say the government's position was not "substantially justified." *See Rawlings* v. *Heckler,* 725 F.2d 1192, 1196 (9th Cir. 1984); *Foster* v. *Tourtellotte,* 704 F.2d 1109, 1112-13 (9th Cir. 1983).

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

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consequences." We have examined the provisions relied upon by appellees and are satisfied the interpretative difficulties they suggest are resolvable. We need not examine them in detail here, however, since in any event Congress was aware that a standard of interpretation requiring resolution of ambiguities in favor of the Natives would be applicable only to Title VIII and other subsistence provisions of that Act. *See* 126 Cong. Rec. 29,279 (1980); 125 Cong. Rec. 9904 (1979).

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

D.C. No. CV A-81-019JMF
No. 82-3678

INUPIAT COMMUNITY OF THE ARCTIC SLOPE AND UKPEAGVIK INUPIAT CORPORATION, ET AL.,
PLAINTIFFS-APPELLANTS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS-APPELLEES.

Appeal from the United States District Court
for the District of Alaska
James M. Fitzgerald, District Judge, Presiding
Argued and Submitted October 7, 1983

Before: BROWNING, Chief Judge, HUG, Circuit Judge, and REED*, District Judge.

OPINION

PER CURIAM:

Appellants, members of the Inupiat Community of the Arctic Slope, sued to enjoin oil development off the North Slope of Alaska in the Beaufort and Chukchi Seas.

Appellants rest their suit primarily upon a claim of aboriginal title based upon centuries of occupancy and use of sea ice many miles from shore for subsistence hunting and fishing.

For reasons stated in *People of the Village of Gambell* v. *Clark*, Nos. 83-3735X, 83-3781 (9th Cir., July 1984), argued and decided with this case, we hold that any abo-

* Honorable Edward C. Reed, Jr., United States District Judge for the District of Nevada, sitting by designation.

riginal rights appellants may have had were extinguished by the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1626.

We agree with the district court (*Inupiat Community of the Arctic Slope* v. *United States,* 548 F. Supp. 182, 188 (D. Alaska 1982)), that appellants' general trust claims are barred by collateral estoppel. *See North Slope Borough* v. *Andrus,* 642 F.2d 589, 611-13 (D.C. Cir. 1980). *See also California* v. *Watt,* 668 F.2d 1290, 1324-25 (D.C. Cir. 1981).

We also reject appellants' claim based upon the Final Act, Conference on Security and Cooperation in Europe, Helsinki, *reprinted in* 73 U.S. Dept. State Bull. 323 (1975) and the International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966). Assuming these international understandings are applicable, appellants point to no provision of either that could be interpreted as imposing upon the United States a greater obligation to protect the subsistence culture of the Natives than that imposed upon the United States by federal domestic law—an obligation already satisfied. *See North Slope Borough* v. *Andrus, supra.* Nor have appellants made any showing of a universal recognition of such a greater obligation that would be necessary to establish a claim based on the law of nations. *See Filartiga* v. *Pena-Irala,* 630 F.2d 876, 881-84 (2d Cir. 1980).

AFFIRMED.

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

N83-003 CIV

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND THE PEOPLE OF THE VILLAGE OF STEBBINS, AN ALASKAN NATIVE IRA ASSOCIATION, PLAINTIFFS,

v.

JAMES S. WATT, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF INTERIOR, DEFENDANTS

ARCO ALASKA, INC., ET AL., DEFENDANT-INTERVENORS.

MEMORANDUM AND ORDER

THIS CAUSE comes before the court on plaintiffs' motion for summary judgment. There are two issues before the court in this motion, both of which can be answered as a matter of law.

I. § 810 of ANILCA

The parties disagree as to whether the "public lands" reference in § 810(a) of ANILCA was meant to include federal lands and waters lying seaward of the three-mile territorial boundaries of Alaska. The court agrees with defendants and defendant-intervenors, and holds that § 810(a) is inapplicable to such lands on the Outer Continental Shelf.

To determine the meaning of "public lands" the court need merely look to the definitional section in title I of ANILCA. Congress gave the term a specific meaning for the purpose of the Act. Public lands means "land situated *in Alaska*" to which the United States holds title. § 102(3)

of ANILCA (emphasis added). The court believes the plain meaning of this phrase is clear and rejects plaintiffs' attempts to manufacture an ambiguity. The court has also reviewed the legislative history and further concludes there is no persuasive evidence that Congress intended the phrase "public lands", as used in § 810(a), should include offshore lands and waters outside the territorial boundaries of Alaska. It is significant to the court that Congress did not mention the Outer Continental Shelf in deliberations concerning both § 102(3) and § 810(a).

II. Aboriginal Rights

Plaintiffs assert the lease sale at issue will injure their possessory interests based on alleged aboriginal hunting and fishing rights. The court rejects this argument and holds that, consistent with Judge Fitzgerald's opinion in *Inupiat Community of Arctic Slope* v. *United States,* plaintiffs have no property rights in the Outer Continental Shelf lands subject to this lease sale. 548 F.Supp. 182, 188 (D. Alaska 1982), *appeal pending,* No. 82-3678 (9th Cir. 1982).

Accordingly, IT IS ORDERED:

1) THAT plaintiffs' motion for summary judgment is denied as to both claims for relief set forth in the complaint.

2) THAT federal defendants' motion to dismiss will be decided as soon as briefing is completed.

DATED this 4th day of April, 1983, at Anchorage, Alaska.

_____

United States District Judge

cc: Donald Cooper
U.S. Attorney
Carl J. D. Bauman

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-3877
DC# CV-A-85-184

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.,
PLAINTIFFS-APPELLANTS,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL.,
DEFENDANTS-APPELLEES,

AND

ARCO ALASKA, INC., ET AL.,
INTERVENORS-APPELLEES.

Before: SNEED, NELSON, and NORRIS, Circuit Judges.

ORDER

Plaintiffs' emergency motion for an injunction pending appeal is denied. The temporary stay entered June 5, 1985, has expired.

Within 7 days of the entry of this order, the Secretary of the Interior, in conjunction with the intervenors-appellees, shall file with the court a hold harmless agreement that will protect appellants from any consequences resulting from significant restrictions upon subsistence uses by appellants of their lands. *See* 16 U.S.C. § 3120. This panel shall retain jurisdiction of the matter for the purpose of reimposing a temporary stay should the panel disapprove the form and substance of the hold harmless agreement. Upon submission for decision, the merits panel shall determine whether the hold harmless agreement should remain in effect.

This appeal is expedited. No prebriefing conference will be held. Appellants shall file their opening brief on or before June 28, 1985. Appellees shall file their answering briefs on or before July 19, 1985. Appellants may file a reply brief within 7 days of the service date of appellees' briefs. No extensions of time will be granted.

The Clerk shall calendar this case for oral argument in Seattle in September.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-3877
(District Court Civil Nos. A85-184 & A85-201)

THE PEOPLE OF THE VILLAGE OF GAMBELL, ET AL., APPELLANTS,

v.

DONALD P. HODEL, ET AL., AND AMOCO PRODUCTION CO., ET AL., APPELLEES.

HOLD HARMLESS AGREEMENT

WHEREAS the People of the Village of Gambell (Gambell) and the People of the Village of Stebbins (Stebbins) on March 14, 1983, filed an action in the United States District Court for the District of Alaska (District Court) (No. N83-003, redesignated No. A85-184) under Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120, unsuccessfully seeking to enjoin Outer Continental Shelf (OCS) Sale No. 57 (Norton Sound) and subsequently, on April 4, 1985, filed a motion for preliminary injunction against exploratory drilling and related operations on the Sale No. 57 leases;

WHEREAS Gambell and Nunam Kitlutsisti (NK) on April 25, 1985, filed a complaint in the District Court (No. A85-201) alleging that OCS Sale No. 83 (Navarin Basin) was conducted in violation of Section 810 of ANILCA and sought a preliminary injunction against exploratory drilling and related operations on the Sale No. 83 leases;

WHEREAS on May 24, 1985, the District Court denied the motions for preliminary injunction of Gambell, Stebbins and NK and they appealed that action to the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) and moved that Court to enter an injunction pending

appeal that would prohibit exploratory drilling and related operations on Sale Nos. 57 and 83 leases;

WHEREAS Exxon Corporation (Exxon) intends to conduct and ARCO Alaska, Inc. (ARCO) has been authorized to conduct exploratory drilling and related operations during the ice-free season of 1985 upon Sale No. 57 leases as operators on their own behalf, as well as on behalf of other well participants, and Exxon has made financial commitments of about $10 million to undertake these operations;

WHEREAS Amoco Production Company (Amoco), ARCO and Exxon intend to conduct exploratory drilling and related operations during the ice-free season of 1985 upon Sale No. 83 leases as operators on their own behalf, as well as on behalf of other well participants, and have made financial commitments of more than $60 million to undertake these operations;

WHEREAS an order entered by the Ninth Circuit on June 6, 1985, denied Gambell, Stebbins and NK's motion for injunction pending appeal, but reserved the authority to reinstate a temporary stay, which had enjoined exploratory drilling and related operations, if the Secretary of the Interior in conjunction with intervenor-appellees, Amoco, ARCO and Exxon, *et al.,* fails to file within seven days of the entry of the Court's order a "hold harmless agreement that will protect appellants [Gambell, Stebbins and NK] from any consequences resulting from significant restrictions upon subsistence uses by appellees of their lands," within the meaning of Section 810 of ANILCA;

NOW THEREFORE, Amoco, ARCO and Exxon represent to the Secretary of the Interior that they will abide by the terms of the following agreement:

1. Amoco, ARCO and Exxon will hold harmless Gambell and NK from any consequences resulting from significant restrictions upon subsistence uses by these appellants of their lands that are proximately caused by Amoco, ARCO or Exxon's conduct of exploratory drilling

or related operations during the 1985 drilling season on their Sale No. 83 leases.

2. Exxon and ARCO will hold harmless Gambell and Stebbins from any consequences resulting from significant restrictions upon subsistence uses by these appellants of their lands that are proximately caused by Exxon or ARCO's conduct of exploratory drilling or related operations during the 1985 drilling season on their Sale No. 57 leases.

3. For purposes of this agreement the terms

(a) "significant restrictions upon subsistence uses" shall be limited to:

> "(1) A reduction in the availability of harvestable resources caused by a decline in the population of subsistence resources;
>
> "(2) A reduction in the availability of resources caused by an alteration in their distribution or location; or
>
> "(3) The limitation of access by subsistence harvestors."

See Kunaknana v. *Watt,* No. A-83-337 Civ. (December 20, 1983), *aff'd, Kunaknana* v. *Clark,* 742 F.2d 1145 (9th Cir. 1984), transcript of oral opinion, pp. 41-42, attached as Exhibit F to Intervenor-Defendants-Appellees' Memorandum of June 3, 1983, in the above-captioned proceeding. "Significant restrictions upon subsistence uses" shall not include "slight effect[s] as opposed to large or substantial effects." *See Id.* at 42.

(b) "Consequences" shall mean losses of subsistence foods or other physical subsistence resources and shall not include claims for psychological, cultural, religious, emotional, or similar losses.

4. If an appellant establishes that a significant restriction upon subsistence uses has been proximately caused solely by the exploratory drilling or related operations of only one company, that company alone shall be responsi-

ble to hold harmless the affected appellant. If an appellant establishes that a significant restriction upon subsistence uses has been proximately caused by exploratory drilling or related operations on either Sale No. 83 or Sale No. 57 leases, but cannot establish the responsibility of a particular company, all companies then conducting in the relevant lease area the type of operations that proximately caused such restriction shall be severally liable based on principles of comparative fault.

5. Should a dispute arise regarding whether a particular restriction upon subsistence uses is in fact significant within the meaning of this agreement, whether a significant restriction has been proximately caused by exploratory drilling and related operations on either Sale No. 57 or Sale No. 83 leases, or whether the money damages tendered in satisfaction of this hold harmless agreement are sufficient to compensate the affected appellant, the dispute shall be submitted to the District Court, exercising jurisdiction in No. A85-184 & A85-201, under such procedures, including the appointment of a special master, as the District Court may direct.

6. Amoco, ARCO and Exxon's obligations under this agreement are conditioned upon appellants first submitting, pursuant to Title III of the 1978 Amendments to the OCS Lands Act, 43 U.S.C. §§ 1811-1824, any claims for a significant restriction arising out of an oil spill. This agreement will hold appellants harmless with respect to such claims only to the extent that the direct-liability provision of that Title, 43 U.S.C. § 1814, and/or the Offshore Oil Pollution Compensation Fund established by it, 43 U.S.C. § 1817, do not provide appellants adequate compensation for any significant restriction upon subsistence uses of their lands that has been caused by Amoco, ARCO or Exxon.

7. This agreement shall expire 10 days following the submission of the above-captioned case to a merits panel of the Ninth Circuit, unless that panel extends the term of the

agreement during the pendency of its consideration of the case, in which event this agreement shall expire at the end of the 1985 drilling operations or when the merits panel renders its final decision, whichever comes earlier, provided, however, that appellants may assert claims for losses occurring during the term of this agreement for up to 12 months following expiration of this agreement and paragraph 5 will remain in effect for the purpose of resolving such claims.

Accepted:

/s/ DAVID C. SHILTON
David C. Shilton
Attorney, United States
Department of Justice
10th & Pennsylvania Ave., N.W.
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Attorney for the Secretary
of the Interior

June 12, 1985

/s/ E. EDWARD BRUCE
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Attorney for Amoco Production
Company, ARCO Alaska, Inc.
and Exxon Corporation

June 12, 1985

/s/ LEONA A. POWER
Leona A. Power
Deputy Assistant Secretary—
Land & Minerals Management
United States Department of
the Interior
18th & C Streets, N.W.
Washington, D.C. 20240

June 12, 1985

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-2977
DC# CV-A 85-184 JAV
Alaska (Anchorage)

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.,
PLAINTIFFS-APPELLANTS,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL.,
DEFENDANTS-APPELLEES,

AND

ARCO ALASKA, INC., ET AL.,
INTERVENORS-APPELLEES.

Before: SNEED, NELSON and NORRIS, Circuit Judges

ORDER

The panel has reviewed the hold harmless agreement submitted on June 13, 1985, by the Secretary of the Interior, in conjunction with the intervenors-appellees, in compliance with this court's June 6, 1985 order. The panel has concluded that, with two exceptions, the hold harmless agreement is adequate to protect appellants' interests at this stage of the proceedings. The panel that decides this appeal on its merits may review the agreement to determine its continued adequacy.

This panel makes the following two changes in the agreement:

(1) Paragraph 4 is amended to provide that appellants have the initial burden to establish only that a signifi-

cant restriction upon subsistence uses has been proximately caused by exploratory drilling or related operations of intervenors-appellees. Once appellants have established the existence of a subsistence restriction, the burden shall shift to intervenors-appellees to establish that the responsibility lies with a particular company or companies. If intervenors-appellees are unable to do so, then all companies conducting operations in the relevant lease area of the type that caused the restriction shall be jointly and severally liable for damages to appellants.

(2) Paragraph 7 is amended to provide that the hold harmless agreement shall remain in effect until further order of this court.

Appellants' waiver of additional briefing, request for immediate transfer to merits panel, and request for immediate argument are denied. The parties shall abide by the briefing schedule established in the June 6, 1985 order.

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-3877
A85-184 cons. A85-201

PEOPLE OF THE VILLAGE OF GAMBELL,
PEOPLE OF THE
VILLAGE OF STEBBINS, AND NUNAM KITLUTSISTI,
PLAINTIFFS-APPELLANTS,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR,
AND U.S. DEPARTMENT OF THE INTERIOR,
DEFENDANTS-APPELLEES,

ARCO ALASKA, INC., AMOCO PRODUCTION CO., ET AL.,
DEFENDANTS-INTERVENOR-APPELLEES.

APPEAL from the United States District Court for the _____ District of _____

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of ALASKA (ANCHORAGE) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of

the said District Court in this Cause be, and hereby is REVERSED & REMANDED.

cy: James Bamberger
Bruce Landon
Carl Bauman
Judge von der Heydt

Filed and entered OCTOBER 25, 1985

APPENDIX J

UNITED STATEMENT DEPARTMENT OF THE INTERIOR
MINERALS MANAGEMENT SERVICE
WASHINGTON, DC 20240

Finding of No Significant Restriction of Subsistence Uses Lease Sale 57 (Norton Basin)

I have reviewed the attached evaluation prepared under section 810 of the Alaska National Interest Lands Conservation Act. It considers the effect of Lease Sale 57 on subsistence uses and needs, the availability of other lands within the Norton Basin for oil and gas leasing, and alternatives which would reduce or eliminate the leasing of lands needed for subsistence.

I find that the leasing of tracts in Sale 57 will not significantly restrict subsistence uses.

Attachment

(SIGNATURE)
Acting Director

April 22, 1985

SECTION 810
LEASE SALE 57

The Department of the Interior maintains that neither Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) nor the subsistence evaluation procedures in Section 810 of ANILCA apply to Outer Continental Shelf (OCS) leasing activities. In light of the Ninth Circuit Court's decision, November 2, 1984, *Gambell and Stebbins* v. *Clark,* the Minerals Management Service (MMS) has prepared the following evaluation under Section 810 of ANILCA. This evaluates the effects of Norton Basin lease Sale 57 on subsistence uses and needs, the availability of other lands, and other alternatives which would reduce or eliminate the use of the lease sale area needed for subsistence purposes.

ANILCA (Public Law 96-487) provides in Section 810 that:

(a) In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such federal agency—

(1) gives notice to the appropriate state agency and the appropriate local committees and regional councils established pursuant to Section 805;

(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

(b) If the Secretary is required to prepare an environmental impact statement pursuant to Section 102(2)(C) of the National Environmental Policy Act, he shall provide the notice and hearing and include the findings required by subsection (a) as part of such environmental impact statement.

(c) Nothing herein shall be construed to prohibit or impair the ability of the State or any Native Corporation to make land selections and receive land conveyances pursuant to the Statehood Act or the Alaska Native Claims Settlement Act.

(d) After compliance with the procedural requirements of this section and other applicable law, the head of the appropriate federal agency may manage or dispose of public lands under his primary jurisdiction for any of those uses or purposes authorized by this Act or other law.

To determine if a significant restriction of subsistence uses and needs is reasonably foreseeable as a result of the proposal, the following three factors have been considered:

(a) likelihood to reduce the population of harvestable resources;

(b) likelihood to reduce the availability of resources by alteration of their normal distribution patterns; and

(c) likelihood of limitation of access to subsistence resources.

Section 810 of ANILCA does not define the level of restriction which would be "significant." A large reduction

in the abundance of a harvestable resource, major redistributions of those resources, or substantial interference with harvester access to active subsistence sites, or a major increase in non-subsistence harvests by non-rural, non-resident OCS workers would all be significant restrictions. No or a slight reduction in the abundance harvestable resources, no effect (or slight inconvenience) on the ability of harvesters to reach and use active subsistence harvesting sites, and no substantial increase in competition for harvestable resources from non-subsistence harvesters by non-rural, non-resident OCS workers would not be significant restrictions.

Recent case law distinguishes the lease sale from other stages of OCS development, i.e., exploration, development and production. Thus, we are required to consider at this stage only the effects of the lease sale, and not the effects of exploration or development and production. Nevertheless, each of the three stages are examined separately. Since each of these stages has a different probability of occurring as well as a different potential for affecting the environment, this division will also better identify the possible restrictions of each stage on subsistence uses. Future stages are evaluated to the extent possible at this time. We emphasize that, at present, no development and production plans have been proposed. For this reason, the discussion of the development & production stage is based on the hypothetical scenarios and oil-spill-risk-analysis included in the 57 FEIS (USDOI MMS 1982). The stages examined below are:

- Lease Sale
- Exploration
- Development and Production

To repeat, however, we are not required to consider anything other than the lease sale (and associated preliminary activities) at this stage. Therefore, the discussion of subsequent stages (exploration, development & produc-

tion) should not be viewed as the final 810 evaluation for those stages, and should not be regarded as a statement of events which will actually occur.

Summary of the 810 Evaluation for Lease Sale 57.

- *Lease Sale:* Lease Sale 57 occurred in 1982. It has not and will not significantly restrict subsistence uses, for the reasons explained below.
- *Exploration:* Exploratory activities, due to Sale 57, have occurred. To date, they have not significantly restricted subsistence uses. Future exploratory activities will not significantly restrict subsistence uses, for the reasons explained below. An 810 evaluation will be done as each exploration plan is submitted for approval.
- *Development and Production:* At present, no development or production activities are proposed on Sale 57 leases. If they do occur, they may significantly restrict subsistence uses in certain areas.

MMS emphasizes that these development and production activities are not likely to occur. Resource estimates indicate only a 14 percent chance of discovering economically recoverable amounts of oil due to Sale 57. Moreover, nothing in the analysis which follows indicates that development and production activities, due to Sale 57, would lower the long term viability of subsistence in the Norton Basin. Finally, since no development or production activities have been proposed, their precise location, timing, or level of intensity is uncertain. Therefore, if development and production plans are submitted to MMS for review and approval, the possible restrictions to subsistence uses will be analyzed pursuant to section 810 of ANILCA before the development and production plans would be approved.

Evaluation for Lease Sale 57

Subsistence resources and uses in the potentially affected area are discussed in the following documents which are incorporated by reference:

- OCS Environmental Assessment EA AK 81-05 (October 1981), Sec. II.D.
- OCS Environmental Assessment EA AK 83-05 (December 1983), Sects. II.D. and III.D.
- Norton Sale 57 FEIS (USDOI, MMS, 1982), Sects III.B.3 and IV.B.1.c.
- Norton Sale 100 DEIS (USDOI, MMS, 1985), Sects III.C.1, III.D.2, IV.B.2.a, IV.B.3.6, and IV.L.

Also considered were the following reports:

- Technical Report #89, Little, R.L. and L.A. Robbins. 1984. Effects of Renewable Resource Harvest Disruptions on Socioeconomic and Sociocultural Systems: St. Lawrence Island. Prepared for USDOI, MMS, Alaska OCS Region, Socioeconomic Studies Program, Anchorage, AK.
- Technical Report #90, Jorgenson, J.G. 1984. Effects of Renewable Resource Harvest Disruptions on Socioeconomic and Sociocultural Systems: Norton Sound. Prepared for USDOI, MMS, Alaska OCS Region, Socioeconomic Studies Program, Anchorage, AK.
- Exxon's Environmental Report (ER) November, 1983. Sections 3.4.11. and 4.4.11.
  ARCO's Environmental Report (ER), February 1984. Sections III.D.11 and IV.F.1.g.

1. *Lease Sale Area (Area offered for Lease in Sale 57)—Factors Affecting Subsistence Uses and Needs:* Subsistence activities, although concentrated on land, along the coasts, and near shore, occur throughout much of the marine environment in the lease-sale area (see Graphic 2A, Sec. III.B.3, 57 FEIS). Areas of particular concern include territories north and west of St. Lawrence Island which sometimes expand as far as 60 miles out to sea and a band of territory along the coast of the mainland. This band is between 20 and 30 miles wide but expands to include territories several miles west of King Island.

In addition to the discussion of subsistence resources and uses, the Sale 57 FEIS and the Sale 100 DEIS include a forecast of future subsistence trends. According to this forecast, villages located in the study area are expected to exhibit a continued dependence on subsistence; per capita levels of dependence are expected to remain stable during the projected life of the oil field. The City of Nome is also expected to exhibit continued dependence on subsistence, although per capita levels may drop if the relative size of the city's non-Native population increases.

The 810 evaluation of the development and production stage is based on the development and production scenario in Section II.A. of 57 FEIS. This scenario provides the hypotheses and assumptions necessary to make such a determination. Since, at present, no development and production plans exist, the scenario assumes that oil and gas well [sic] be found in economically recoverable amounts; it further assumes that one or more oil spills of 1,000 barrels or greater will occur during the productive life of the field. Resource estimates indicate, however, that there is only a 14-percent chance of discovering commercially recoverable amounts of oil consequent to Sale 57. According to the Sale 57 FEIS, if oil is found in these quantities, there is a 94-percent chance of one or more oil spills of 1,000 barrels or greater. However, because of new information these figures have been revised downward. According to DEIS 100, only a 13-percent chance exists of discovering commercially recoverable oil in the Sale 57 area; if oil is found in these quantities, there is only a 78-percent chance of one or more spills of 1,000 barrels or greater.

To determine the potential significant effects on subsistence uses and needs, the following criteria have been considered: (1) potential to reduce the population of harvestable resources; (2) potential to reduce availability of resources by alteration of their normal distribution patterns; and (3) limitation of access to subsistence resources.

a. *Potential to Reduce the Population of Harvestable Resources:* For the purpose of analyzing the significance of the effects of the three stages on subsistence for this 810 determination, the Norton Basin study area has been divided into four regions: inner Norton Sound, the Yukon River Delta, St. Lawrence Island, and Nome/Cape Nome (see DEIS 100 Secs. III.C.1. and IV.B.2.a.).

(1) *Inner Norton Sound:* There have been no acute effects to the biological resources to date from seismic activities. Chronic effects may become evident, but are not expected to occur and have not occurred. The general location of endangered whales in the vicinity of Sale 57 can be found in Starr et al. (1981, cited in 100 DEIS) and the location of seismic activity associated with Sale 57 can be located in several volumes of the *Oil and Gas Journal* (see November 12, 1984; p. 13). Timing of expected activities and summaries of actual permitted actions and anticipated actions can be found in a memorandum from RSRE to RSLE, February 27, 1984. The effects of seismic activities on fishes in the area are not expected to be significant since geohazard surveys will be used for shallow seismic work (Alan Adams and Ben Jarvi, personal communication, MMS). Geohazard surveys are viewed as having even fewer negative effects than airguns, which are also viewed as being relatively innocuous (see discussion of seismic effects on lower trophic level organisms and fishes, Sections IV.B.1.a.(2) and IV.B.1.b.(2), Sale 100 DEIS). Endangered whales do not frequent the area where and when seismic activities have occurred. Also, noise and traffic disturbance due to supply boats and helicopters during the exploratory or development and production stages will have little effect on the size of the populations of the region's harvestable resources. Inner Norton lies wil[sic] outside of the leased area, hence beyond any anticipated seismic activity associated with this lease sale (see Fig. II-B-2 and Graphic

2A, Sec. III.B.3., 57 FEIS). Moreover, air-and boat-supply traffic occurs in a direct line from Nome and/or Cape Nome to the exploration platforms. Supply traffic is expected to follow a similar course should the development and production stage occur. Such supply lines lie well outside of inner Norton Sound's subsistence territories. Therefore, the inner Norton region should experience little if any noise and traffic disturbance during exploration or the development and production phase should it occur. Such local and intermittent disturbance would not significantly reduce the populations of the region's harvestable resources.

According to the biological analysis, most effects on the size of the populations of harvestable resources would come from oil spills. Oil spills are very unlikely unless the development and production stage is reached. Should oil spills occur, Stipulation No. 4 (a drilling restriction in pack and broken ice) may help insure oil spill cleanup capability. Should oil spills occur, their effects are expected to be minor for all species, except in the case of fish, marine and coastal birds, and marine mammals (see Secs. IV.B.2.6., c., d., and e., Sale 57 FEIS). Oil spill effects on fish, particularly salmon, sheefish, and whitefish are expected to be moderate to low. Effects on birds are most likely to be moderate. However, some local effects could be high. Effects on marine mammals are most likely to be moderate; while individual animals within populations may be affected, population levels are not expected to decline. Definitions of biological effects in the EIS are made on a regional basis; subsistence activities occur in local territories. Because of the currents, prevailing winds, and ice conditions in the lease area and because of the location of the sale, inner Norton Sound has an extremely low chance of experiencing the effects of a potential oil spill. The analysis of subsistence in the 57 EIS takes into account the local nature of subsistence systems. Because

levels of noise disturbance would be low and occur well out to sea and because it is very unlikely that a spill would occur and oil the inner Norton Sound area, restrictions on subsistence in the region are not likely to be significant. While a resource in this region may be affected, effects are likely to be intermittent, last less than 1 year, and not make any species unavailable to a village in the inner Norton Sound region.

- *Lease Sale:* The leasing action and associated preliminary activities prior to exploration have not restricted and will not significantly restrict subsistence uses.
- *Exploration:* Exploration activities will be minimal in this region. Such activities have not restricted and will not significantly restrict subsistence uses.
- *Development and Production:* The kinds of short-term effects to the populations of harvestable resources that may occur during the development and production stage will not significantly restrict subsistence uses in this region.

(2) *Yukon River Delta:* In response to subsistence and environmental concerns, 11 blocks within 12 miles of the Yukon Delta were not offered for lease in Sale 57. There have been no acute effects to the biological resources to date from seismic activities. Chronic effects may become evident, but have not occurred and are not expected to occur. The general location of endangered whales in the vicinity of Sale 57 can be found in Starr et al. (1981, cited in 100 DEIS) and the location of seismic activity associated with Sale 57 can be located in several volumes of the *Oil and Gas Journal* (see November 12, 1984; p. 13). Timing of expected activities and summaries of actual permitted actions and anticipated actions can be found in a memorandum from RSRE to RSLE, February 27, 1984. The effects of seismic activities on fishes in the area are not expected to be significant since geohazard surveys will be used for shallow seismic work (Alan Adams and Ben

Jarvi, personal communication, MMS). Geohazard surveys are viewed as having even fewer negative effects than airguns, which are also viewed as being relatively innocuous (see discussion of seismic effects on lower trophic level organisms and fishes, Sections IV.B.1.a.(2) and IV.B.1.b.(2), Sale 100 DEIS). Endangered whales do not frequent the area where and when seismic activities have occurred or are expected to occur. Also, noise and traffic disturbance due to supply boats and helicopters during the exploratory or development stages will have little effect on the size of the populations of the region's harvestable resources. The Secretary elected not to offer for lease 11 blocks within 12 miles of the Yukon Delta, due to subsistence biological concerns. Although some leased blocks in the Sale 57 area fall within the area exploited by Delta villages (see Graphic 2A, Sec. III.B.3., 57 FEIS), most of the Delta's subsistence areas are not included. Moreover, air- and boat-supply traffic occurs in a direct line from Nome and/or Cape Nome to the exploration platforms. Supply traffic is expected to follow a similar course should the development and production stage occur. Therefore, the Yukon River Delta should experience little noise and traffic disturbance during exploration or the development and production stage should it occur. Such local and intermittent disturbance would have an insignificant effect on the populations of the region's harvestable resources.

According to the biological analysis, most effects on the size of the populations of harvestable resources would come from oil spills. Oil spills are very unlikely unless the development and production stage is reached. Should oil spills occur, Stipulation No. 4 (a drilling restriction in pack and broken ice) may help insure oil spill cleanup capability. Should oil spills occur, their effects are expected to be minor for all species, except in the case of fish, marine and coastal birds, and marine mammals (see Secs. IV.B.2.b., c., d., and e., Sale 57 FEIS). Oil spill effects on fish, particularly salmon, sheefish and whitefish are expected to be moderate to low. Effects on birds are

most likely to be moderate. However, some local effects could be high. Effects on marine mammals are most likely to be moderate; while individual animals within the population may be affected, population levels are not expected to decline. Definitions of biological effects in the EIS are made on a regional basis; subsistence activities occur in local territories. Because of the currents, prevailing winds, and ice conditions in the study area and because of the location of the sale, the Yukon Delta has an extremely low chance of experiencing the effects of a potential oil spill. The analysis of subsistence in the 57 EIS takes into account the local nature of subsistence systems. Because levels of noise disturbance would be low and occur well out to sea and because it is very unlikely that an oil spill would occur and oil the Yukon Delta, restrictions on subsistence on the Delta are not likely to be significant. While a resource in this region may be affected, effects are likely to be intermittent, last less than 1 year, and not make any species unavailable to a Yukon River Delta village.

- *Lease Sale:* The leasing action and associated preliminary activities prior to exploration have not restricted and will not significantly restrict subsistence uses.
- *Exploration:* The limited and short-term effects of exploration activities have not restricted and will not significantly restrict subsistence uses.
- *Development and Production:* The kinds of short-term effects to the populations of harvestable resources that may occur during the development and production stage will not significantly restrict subsistence uses in this region.

(3) *St. Lawrence Island:* There have been no acute effects to the biological resources to date from seismic activities. Chronic effects may become evident, but have not occurred and are not expected to occur. The general location of endangered whales in the vicinity of Sale 57 can be found in Starr et al. (1981, cited in 100 DEIS) and the loca-

tion of seismic activity associated with Sale 57 can be located in several volumes of the *Oil and Gas Journal* (see November 12, 1984; p. 13). Timing of expected activities and summaries of actual permitted actions and anticipated actions can be found in a memorandum from RSRE to RSLE, February 27, 1984. The effects of seismic activities on fishes in the area are not expected to be significant since geohazard surveys will be used for shallow seismic work (Alan Adams and Ben Jarvi, personal communication, MMS). Geohazard surveys are viewed as having even fewer negative effects than airguns, which are also viewed as being relatively innocuous (see discussion of seismic effects on lower trophic level organisms and fishes, Sections IV.B.1.a.(2) and IV.B.1.b.(2), Sale 100 DEIS). Endangered whales do not frequent the area where and when seismic activities have occurred or are expected to occur. During the exploratory and development and production stages noise and traffic disturbance from supply boats and helicopters will have little effect on the size of the populations of the study area's harvestable resources. During these stages, Stipulation No. 5 (a seasonal drilling restriction) may help protect bowhead whales. If the development and production stage is reached, disturbance from oil tankers also would have little effect. None of the lease area falls within the area exploited by St. Lawrence Islanders (see Graphic 2A, Sec. III.B.3, 57 FEIS). Moreover, air- and boat-supply traffic occurs in a direct line from Nome and/or Cape Nome to the exploration platforms. Supply traffic is expected to follow a similar course should the development and production stage occur. Furthermore, most oil tanker traffic should occur east of the areas exploited by the islanders. Therefore, while some short-range and short-term displacement of marine mammals may occur (see below, Potential to Reduce Availability of Resources by Alteration of Their Normal Distribution Patterns), few effects due to noise and traffic

are expected on the populations of the animals hunted by St. Lawrence Islanders even if the development and production stage is reached.

According to the biological analysis, most effects on the size of the populations of harvestable resources due to Sale 57 would come from oil spills should the development and production stage occur. Stipulation No. 4 (a drilling restriction in pack and broken ice) may help mitigate the possible effects of oil spills. Should oil spills occur, their effects are expected to be minor for all species, except in the case of fish, marine and coastal birds, and marine mammals (see Sects. IV.B.2.6., d., and e., Sale 57 FEIS). Oil spill effects on fish, particularly salmon, sheefish, and whitefish are expected to [sic] moderate to low. Effects on birds are most likely to be moderate. However, some local effects could be high. Effects on marine mammals are most likely to be moderate; while individual animals within populations may be affected, population levels are not expected to decline. Definitions of biological effects in the EIS are made on a regional basis; subsistence activities occur in local territories. The probability of an oil spill of 1000 barrels or greater contacting sea segments from Cape Douglas to St. Lawrence is less than 20-percent (see Fig. IV.A.4.C.-2 Sale 57 FEIS). If oil contacts one of these biological resource areas during the summer, it is likely to affect the subsistence populations exploited by St. Lawrence Islanders. While biological effects to a species population for the entire study area would be low, these effects would be concentrated in areas used by St. Lawrence hunters.

Because of the possibility of adverse effect as described in the preceding paragraphs (i.e., subsistence activities may be adversely affected by the low levels of noise and disturbance; biological effects to a species population from a potential oil spill would be concentrated in areas used by the Region's subsistence hunters), restrictions to St. Lawrence Island's subsistence uses may be significant

should the production stage be reached. One or more important subsistence resources could become unavailable to one or more villages for a period of 1 year or less. If such a spill occurred, marine and coastal birds would most likely suffer local population losses; walrus might also be oiled (see Secs. IV.B.1.d and IV.B.2.a Sale 100 DEIS). Although such effects may or may not decrease the total amount of subsistence foods in the diet, they would affect the relative amounts of the various subsistence foods consumed. People may, for example, be forced to forego preferred foods such as seabirds and eat less desirable foods. Such effects also would increase the expenditure of time and/or money necessary for adequate harvests and thus raise the cost of subsistence.

It is unlikely that more than one or two villages would experience such restrictions. It is unlikely that these restrictions would last more than one or two years. However, such restrictions on subsistence would be community-wide and measurable. Although these are not the most likely consequences (there is only a 13-percent chance or less under current estimates of finding commercial quantities of oil), they are likely to occur if production occurs.

- *Lease Sale:* The leasing action and associated preliminary activities prior to exploration have not restricted and will not significantly restrict subsistence uses.
- *Exploration:* The limited and short-term effects on populations of harvestable resources by exploration activities have not and will not significantly restrict subsistence uses.
- *Development and Production:* The development and production stages of the proposal may significantly restrict subsistence uses in the St. Lawrence Island region if oil is discovered in economically recoverable quantities.

Nome/Cape Nome: There have been no acute effects to the biological resources to date from seismic activities. Chronic effects may become evident but have not occurred and are not expected to occur. The general location of en-

dangered whales in the vicinity of Sale 57 can be found in Starr et al. (1981, cited in 100 DEIS) and the location of seismic activity associated with Sale 57 can be located in several volumes of the *Oil and Gas Journal* (see November 12, 1984; p. 13). Timing of expected activities and summaries of actual permitted actions and anticipated actions can be found in a memorandum from RSRE to RSLE, February 27, 1984. The effects of seismic activities on fishes in the area are not expected to be significant since geohazard surveys will be used for shallow seismic work (Alan Adams and Ben Jarvi, personal communication, MMS). Geohazard surveys are viewed as having even fewer negative effects than airguns, which are also viewed as being relatively innocuous (see discussion of seismic effects on lower trophic level organisms and fishes, Sections IV.B.1.a.(2) and IV.B.1.b.(2), Sale 100 DEIS). Endangered whales do not frequent the area where and when seismic activities have occurred or are expected to occur. Noise and traffic disturbance during the exploratory and development and production stages from supply boats and helicopters would have little effect on the size of the populations of the study area's harvestable resources. If the development and production stage is reached, disturbance from oil tankers would also have little effect. However, potential effects would be concentrated in the Nome/Cape Nome region. Oil tankers are expected to load at Cape Nome and travel south. Air- and boat-supply traffic is expected to originate at Cape Nome and/or at the Nome airport and radiate out to the various exploration and production platforms. Such disturbances may affect local populations of nesting birds and hauled-out marine mammals, but only to a negligible degree. Such noise and traffic disturbance would, occasionally, interfere with subsistence activities but should not have a significant effect on the populations of the animals hunted in the Nome/Cape Nome region even if the development and production stage is reached.

According to the biological analysis, most effects on the size of the populations of harvestable resources due to Sale 57 would result from oil spills should the development and production stage occur. Stipulation No. 4 (a drilling restriction in pack and broken ice) may help mitigate possible oil spills. Should oil spills occur, their effects are expected to be minor for all species, except in the case of fish, marine and coastal birds, and marine mammals (see Secs. IV.B.2.b., c., d., and e., Sale 57 FEIS). Oil spill effects on fish, particularly salmon, sheefish, and whitefish are expected to be moderate to low. Effects on birds are most likely to be moderate. However, some local effects could be high. Effects on marine mammals are most likely to be moderate; while individual animals within populations may be affected, population levels are not expected to decline. Definitions of biological effects in the EIS are made on a regional basis; subsistence activities occur in local territories. The probabilities of an oil spill of 1000 barrels or greater contacting land or sea segments in the region within 10 days is less than 11-percent for the land segments from Stebbins to Cape Douglas and less than 20-percent for the sea segments from Cape Douglas to St. Lawrence Island (see Fig. IV.A.4.c.-2, Sale 57 FEIS). Oil spills contacting the sea segments between Cape Douglas and St. Lawrence Island (Chirikof Basin) could affect the population of large marine mammal resources utilized by Eskimo sub-groups living in the Nome area, such as the King Island community, Diomede Islanders, and St. Lawrence Islanders. While biological effects to a subsistence population for the entire study area would be moderate to low, effects on the Nome/Cape Nome region would be concentrated in areas used by the region's subsistence hunters.

Because subsistence activities within the Nome/Cape Nome region may be adversely affected (during the development & production stage) as described in the preceding

paragraphs (i.e., subsistence activities may be adversely affected by the low levels of noise and disturbance, biological effects to a subsistence population from a potential oil spill would be concentrated in areas used by the region's subsistence hunters), restrictions to the subsistence uses of the Nome/Cape Nome region may be significant. One or more important subsistence resources could become unavailable to one or more villages for a period of 1 year or less. If an oil spill occurred, marine and coastal birds would most likely suffer local population losses; a species of spawning fish or the walrus population may also be affected (see Secs. IV.B.1.b, c, and d and IV.B.2.a Sale 100 DEIS). Although such effects probably would not decrease the total amount of subsistence foods in the diet, they would affect the relative amounts of the various subsistence foods consumed. People may, for example, be forced to forego preferred foods such as seabirds and eat less desirable foods. Such effects also would increase the expenditure of time and/or money necessary for adequate harvests and thus raise the cost of subsistence.

It is unlikely that more than one or two villages would experience such restrictions. It is unlikely that these restrictions would last more than 1 or 2 years; such restrictions on subsistence would be community-wide and measurable. Although these are not the most likely consequence (there is only a 13-percent chance or less under current estimates of finding commercial quantities of oil), they are likely to occur if production occurs.

- *Lease Sale:* The leasing action and associated preliminary activities prior to exploration have not restricted and will not significantly restrict subsistence uses.
- *Exploration:* The limited and short-term effects on populations of harvestable resources by exploration activities have not restricted and will not significantly restrict subsistence uses.
- *Development and Production:* The development and production stage of the proposal may significantly restrict

subsistence uses in the Nome/Cape Nome region if oil is discovered in economically recoverable quantities.

b. *Potential to Reduce Availability of Resources by Alteration of Their Normal Distribution Patterns:* Given the extensive distribution and numbers of fishery resources, birds, and marine mammals within the study area, small alterations in species-distribution patterns should not significantly restrict the subsistence uses of Norton Sound communities.

If the development and production stage of the proposal is reached, 54 hectares of habitat loss will occur at Cape Nome due to onshore facility siting from both Sales 57 and 100. Airplane and helicopter traffic may result in minor amounts of disturbance to bird nesting areas but should not significantly affect the important bird rookeries on St. Lawrence, King, and Little Diomede Islands. Changes in distribution will be local and involve small numbers of birds. Marine mammals may be temporarily displaced from environs immediately surrounding construction sites; but this displacement, along with changes associated with air and vessel traffic routes, is not expected to be significant. Such temporary displacement may, on occasion, inconvenience subsistence hunters, causing a group to hunt longer or make an extra trip. The displacement which does occur may be concentrated in the Nome/Cape Nome region. However, this displacement should not, by itself, affect the overall amounts or types of harvests.

- *Lease Sale:* The leasing action and associated preliminary activities prior to exploration have not altered and will not alter normal distribution patterns of any subsistence resources in any of the four regions of the proposal: Inner Norton Sound, the Yukon River Delta, St. Lawrence Island, or Nome/Cape Nome.
- *Exploration:* Exploration activities have not reduced and will not significantly reduce the availability of subsistence resources in any of these four regions by changing the normal distribution pattern of a species.

• *Development and Production:* Development and production activities are not likely to significantly restrict the availability of subsistence resources by altering their normal distribution patterns in any of these four regions.

c. *Limitation of Access to Subsistence Resources:* The leasing action did not and will not limit access to subsistence resources because it included only the administrative action of leasing and the preliminary activities associated with leasing. There are no population changes anticipated to occur in connection with the sale and associated preliminary activities. While some species may avoid seismic boats, such avoidance would be intermittent and of extremely short duration. The exploration stage of Sale 57 also has not limited and will not significantly limit access to these resources. Some species may avoid seismic boats, supply boats and helicopters, and exploratory platforms but such disturbances are localized, intermittent, and of short duration. Moreover, most of these exploratory operations occur far from shore. Exploratory activities have not increased and will not significantly increase Nome's population. If the development and production stage is reached, there will be approximately 4 oil production platforms due to Sale 57. If commercially recoverable natural gas is discovered, there will be 6 gas production platforms. These would be located far from shore. Oil storage facilities in the Nome/Cape Nome area would cover approximately 30 hectares of land (see DEIS 100). When the total area available to subsistence uses is considered, this amount of land is not significant. If the development and production stage of the proposal is reached, the population of Nome is expected to increase by less than 300 people due to Sale 57. Most of the increase would consist of non-Native oil workers who would remain uninvolved with subsistence activities. The population of the other communities in the study area is not expected to increase due to the proposal. Improved transpor-

tation systems may encourage a small increase in the number of sports hunters and fishermen who enter the sale area. However, this increase should be too small to offer significant competition with subsistence activities. Neither the lands used for production and development due to Sale 57, nor the population changes due to the sale, are expected to have significant effects on access to subsistence resources.

- *Lease Sale:* The leasing action and associated preliminary activities prior to exploration has not limited and will not limit access to subsistence resources in any of the four regions of the proposal: Inner Norton Sound, the Yukon River Delta, St. Lawrence Island, or Nome/Cape Nome.
- *Exploration:* Exploration activities have not limited and will not significantly limit access to subsistence resources in any of the four regions.
- *Development and Production:* The proposal should not significantly limit access to subsistence resources in any of the four regions.

2. *Availability of Other Lands:* In determining the area to be offered for lease, the Secretary of Interior did consider other lands. Alternative I, the proposal, included 429 tracts. The Secretary offered for lease 418 tracts; 11 tracts, 12 miles from the Yukon River Delta were deleted in response to subsistence and environmental concerns.

For a detailed discussion on the effects on subsistence uses under the proposal (Alternative I), see Sale 57 EIS. The EIS at 142 explained with respect to development & production associated with the proposal (Alternative I):

> "While some changes in local subsistence use and take may occur, the probability of significant disturbance . . . is unlikely for the region as a whole."

Other alternatives considered by the Secretary of Interior and analyzed in the 57 FEIS are as follows:

Alternative IV would delete 121 blocks from the proposed sale area in the northern portion of Norton Sound. This would decrease by 46-percent the number of oil spills expected over that of the proposal and a 46-percent decrease in the expected production of recoverable resources. While this alternative would not significantly reduce major potential impacts on the human and biological resources of the Sound, some reductions in potential risk from oil spills could be expected for the northern coast of Norton Sound.

Alternative V would delete 181 blocks in the eastern half of the proposed sale area. This would decrease by 80-percent the expected number of oil spills expected over that of the proposal and a 80-percent decrease in expected resource recovery. This alternative would significantly reduce major potential effects on the human and biological resources of the Norton Sound area.

Alternative VI would delete 157 blocks in the southern portion of Norton Sound. According to USGS resource estimates, no oil is expected to be found in these deleted blocks. Therefore, the expected number of oil spills and the potential effects from oil spills would be the same as for the proposal. If commercial quantities of oil are located in the southern deletion blocks, it would pose significant potential effects to the Yukon Delta. Hence, this alternative significantly reduces the potential for oil-related effects to the Yukon Delta region.

3. *Other Alternatives:* A brief discussion of the no-sale alternative and the delay-the-sale alternative is provided below. The remaining alternatives are discussed above in Availability of Other Lands. Alternative II (no sale) would result in no adverse effects on the study area's subsistence patterns. Effects on subsistence use patterns of Alternative III (delay the sale) would be the same as those for the sale, only delayed.

4. *Discussion:*

• *Lease Sale:* The actual lease sale for Norton Basin Sale 57 is an administrative action consisting of offers, bids, evaluations, and lease awards. The only oil- and gas-related activities that occur as a direct result of awarding leases are preliminary activities. As defined in 30 CFR 250.34, such activities do not result in any significant adverse effect on the natural resources of the outer continental shelf and would not have a significant effect on subsistence uses in any of the four regions of the study area.

• *Exploration:* Exploratory activities, including seismic investigations undertaken as a result of leases and exploratory drilling, have occurred as a consequence of the lease sale and their effects have been examined. These activities could result in effects from site-specific seismic investigations, exploratory drilling, accidental spills, discharge of formation waters and drilling muds, noise, traffic from boat- and aircraft-support activities, onshore support facilities, local population increases, and oil- and gas-related employment. The exploratory operations have been considered in this 810 analysis and found not to significantly restrict subsistence uses in any of the four regions of the study area.

• *Development and Production:* Development and production activities would be expected to occur if economically recoverable hydrocarbons are discovered. Finding economic quantities of recoverable oil and the development and production of that oil is given a 13-percent chance of happening under current estimates. Development and production activities consist of the drilling of additional wells; the construction of pipelines and storage facilities, loading facilities, shorebases; tankering, traffic, and planned and accidental discharges. Of these activities, oil spills have the most potential to have unavoidable adverse effects on subsistence uses; other activities are of less concern.

This 810 evaluation assumes that, if the development and production stage occurs, one or more oil spills of 1,000 barrels or greater will occur during the productive life of the field. According to the Sale 57 FEIS, a 14-percent chance exists of discovering oil in commercial quantities. A 94-percent chance exists of an oil spill of 1,000 barrels or greater occurring if such quantities of oil are discovered. However, because of new information these figures have been revised downward. According to the Sale 100 DEIS, only a 13-percent chance exists of discovering commercially recoverable oil in the Sale 57 area; if oil is found in these quantities, there is only a 78-percent chance of one or more spills of 1,000 barrels or greater.

Given these figures, it is extremely unlikely that an oil spill would occur and contact the nearshore populations of mammals, fish, and birds used for subsistence by inner Norton villages (Golovin, Elim, Moses Point, Koyuk, Shaktoolik, Unalakleet, St. Michael and Stebbins) or used by villages on the Yukon Delta (Kotlik, Emmonak, Alakanuk, Mountain Village, St. Mary's, and Sheldon Point). The probabilities of such an event are less than 1 percent. Significant changes in the populations and distributions of subsistence species, or limitations to access, are not expected. For these reasons, this evaluation demonstrates that no significant restriction of subsistence uses in inner Norton Sound or on the Yukon Delta is foreseeable from the lease sale.

Given the oil-spill-risk figures for Sale 57, less than a 20-percent probability exists that the subsistence-use area of one or more villages in the St. Lawrence Island or Nome/Cape Nome regions may be contacted by an oil spill of 1,000 barrels or greater, if an oil spill occurs. An oil spill is unlikely unless development and production occurs. The possibility of a spill contacting the shore or nearshore environment is less. It is not likely that such a spill would cause a subsistence species to become unavailable to

a community for more than 1 year or that the spill would reduce the total amount of subsistence foods consumed by humans in the affected community. Such a spill could, however, damage one or more local subsistence resources enough to make them unavailable for 1 year or less or to make them more difficult to hunt. Thus, an oil spill could significantly raise the costs of subsistence production for 1 year, force a change in the relative amounts of the various subsistence resources consumed, and/or cause communities to consume stored subsistence foods. However, the low levels of noise and traffic disturbance that could occur during the development and production stage would be concentrated in the Nome/Cape Nome and, to a lesser extent, in the St. Lawrence Island regions, and these levels may affect subsistence uses.

Because of the oil-spill risks to biological resources and because of the geographical distribution of support facilities and transportation routes, we have found that Sale 57 may have a significant restriction on the subsistence systems of the Nome/Cape Nome and/or St. Lawrence Island regions if the development and production stage is reached and if a spill occurs. Although this is not the most likely event, there is a possibility that one or more subsistence resources may become locally unavailable for a period not exceeding 1 or 2 years. It is likely that few such events (two or fewer) would occur. Moreover, should an oil spill occur it would not affect the Norton Basin region as a whole. However, the effect of an oil spill on the subsistence system of the local Nome/Cape Nome and/or St. Lawrence Island regions would likely be significant. For affected villages, the cost of subsistence production could be raised for 1 or 2 years, the types of subsistence resources consumed could be changed for 1 or 2 years, and the amounts of subsistence resources stored or shared within and outside the affected community could drop.

5. *Findings:*

• *Lease Sale:* The actual lease sale for Sale 57 and associated preliminary activities prior to exploration will not significantly restrict subsistence uses.

• *Exploration:* Exploratory activities due to Lease Sale 57 are not likely to significantly restrict subsistence uses.

• *Development and Production:* Included above is an analysis of the development and production stage of the proposal based on hypothetical development scenarios and a 13-percent possibility of finding economically recoverable oil. Currently, no activities are proposed that would restrict subsistence uses. Significant restrictions on subsistence areas are not likely for the Norton Basin region as a whole. However, we have found that if the development and production stage is reached, a significant restriction of subsistence uses may occur in certain localities.

Although this finding is based upon reasonable and valid assumptions, there is a great deal of uncertainty about the precise location, timing, or level of intensity of either future exploration or development and production.

Therefore, if future exploration plans are submitted to MMS for review and approval, the possible effects on subsistence uses will again be analyzed pursuant to section 810 of ANILCA before these plans are approved. If discoveries are made and development and production plans are submitted to MMS, they too will be subjected to review under section 810 before approval.

However, given the low probability that oil will be found, these possible restrictions are not likely to occur, even locally, as a result of the sale.

APPENDIX K

UNITED STATES DEPARTMENT OF THE INTERIOR
MINERALS MANAGEMENT SERVICE
ALASKA OUTER CONTINENTAL SHELF REGION
ANCHORAGE, ALASKA

OCS ENVIRONMENTAL ASSESSMENT
EA No. AK 84-10
December 1984

Operator *Exxon Company, U.S.A.* *Lease* *Block*
Plan Type *Exploration*
Area *Sale 83* (Navarin Basin) OCS-Y (See Page 1)
Platform *N/A*
Date deemed complete
November 28, 1984

Prepared by
Office of the Regional Supervisor
Leasing and Environment

Related Environmental Documents

U.S. DEPARTMENT OF THE INTERIOR
MINERALS MANAGEMENT SERVICE

Final Environmental Impact Statement, Proposed 5-Year OCS Oil and Gas Lease Schedule, March 1980 to February 1985

OCS Environmental Assessment, EA No. AK 81-06, Deep Stratigraphic Test Well Program, Bering Sea, Navarin Basin

Final Environmental Impact Statement, Navarin Basin, (OCS Lease Sale No. 83). March, 1984.

Draft Environmental Impact Statement St. George Basin (OCS Lease Sale No. 89). May, 1984

Final Environmental Impact Statement St. George Basin (OCS Lease Sale No. 70). August, 1982.

In Section II. F. of the ER, it is stated that current plans call for a support vessel to be temporarily moored offshore St. Matthew to store supplies, and to be used as an alternate helicopter landing base and refueling stop. A barge was previously moored off St. Matthew Island in support of the Navarin Basin DST well. In addition, air transit over or near St. Matthew is judged to be necessary to ensure flight safety contingencies. According to the Navarin FEIS (Section III, E. 1.), increased presence of man (i.e., air and vessel visibility and noise) would reduce the perception of the island's remoteness which is a major component of solitude and an exceptional value of the island.

G. *SUBSISTENCE, SECTION 810 (ANILCA) EVALUATION AND FINDING*

Summarized is an evaluation of effects of the proposed EP on subsistence uses and needs, the availability of other lands, and other alternatives which would reduce or eliminate the use of the tracts needed for subsistence purposes.

ANILCA (Public Law 96-487, 94 § 2371-2251) provides in Title VIII, section 810 that:

"(a) In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency:

(1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 805;

(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

(b) If the Secretary is required to prepare an environmental impact statement pursuant to section 102(2)(C) of the National Environmental Policy Act, he shall provide the notice and hearing and include the findings required by subsection (a) as part of such environmental impact statement.

(c) Nothing herein shall be construed to prohibit or impair the ability of the State or any Native Corporation to make land selections and receive land conveyances pursuant to the Alaska Statehood Act or the Alaska Native Claims Settlement Act.

(d) After compliance with the procedural requirements of this section and other applicable law, the head of the appropriate Federal agency may manage or dispose of public lands under his primary jurisdiction for any of those uses or purposes authorized by this Act or other law."

1. *Evaluation*

Subsistence resources and uses in the potentially affected area are discussed in the following documents:

Exxon's ER, Chapter III, Section D.11.

Navarin FEIS, (Sale 83 area) Chapter III, Section D.3.
St. George FEIS (Sale 70 area), Chapter III, Section C.2.
St. George DEIS (Sale 89 area), Chapter III, Section C.3.

No subsistence activities take place in the vicinity of Exxon's leases except for the seafood resources harvested by commercial fishermen for subsistence purposes. However, species utilized for subsistence purposes either occupy or traverse the Navarin Basin OCS lease area during portions of the year. The discussion of subsistence use areas in these documents can be divided into two groups of potentially affected areas: 1) Host Communities (of petroleum industry support operations)—Unalaska, Cold Bay, and St. Paul and St. George on the Pribilof Islands; and 2) Bering Strait Island Communities (Bering Sea Large-Mammal-Hunting Communities)—Gambell and Savoonga on St. Lawrence Island, Little Diomede, and King Islanders in Nome (as well as other Bering Strait Islanders living in Nome and the village of Wales on the Seward Peninsula). The discussion in the EIS's also includes a forecast of future subsistence trends.

The Navarin Basin EIS and the two St. George EIS's listed above are based on scenarios with varying probabilities which include exploration, development and production. Therefore, the effects on subsistence of the proposed exploration was approximated by appropriate reductions in probable effects.

a. *Factors Affecting Subsistence Uses and Needs*

To determine the potential significant effects on subsistence uses and needs, the following three potential effects have been considered.

(1) *Potential to reduce the population of harvestable resources.*

Harvestable resources can be reduced by detrimental physical events such as noise disturbance from offshore oil and gas activities and oil spills and increased human harvesting (due to increased population pressure) on available resources.

Host Communities

The identification of subsistence resources used by residents of host communities is in the Navarin FEIS (Sale 83 area) Chapter III, Section D.3.a.1 and 2.

Unalaska and Cold Bay. The potential reduction of harvestable resources is discussed in the Navarin FEIS (Sale 83 area) Chapter IV, Section B.3.c.1. Since no new facilities are proposed in either of these communities, the only possible reduction in the population of subsistence resources would occur due to increased human population. Due to the limited duration (May to January) and small size of project-induced population increase (14 people at the service base in Dutch Harbor), no significant reduction of subsistence resource populations would be expected.

St. Paul and St. George. The Navarin FEIS (Sale 83 area) did not consider the effects of the potential use of these Pribilof Islands' communities as host communities. The St. George FEIS (Sale 70 area) and the St. George

DEIS (Sale 89 area) discussed the use of St. George Island as the site of an oil terminal in support of production which would employ 200 persons annually. The St. George DEIS (89) concludes that this additional population would not have a significant effect on subsistence resources. Given the limited duration (May to January) and small size of the proposed exploration project-induced population increase (47 people in a small enclave at the airport on St. Paul), no significant reduction of subsistence resource populations would be expected.

Effects on subsistence resources of the Pribilof Islands of oil spill effects are discussed in the St. George FEIS (Sale 70 area), Chapter IV, Section E. 2. b. and St. George DEIS (Sale 89 area) Chapter IV, Section B. 1. b. 3. The primary adverse effect on subsistence resources would result from an oil spill on fur seals. However, according to Exxon's (OSCP), Chapter 8, for the proposed exploration, the probability of a major oil spill (1000 barrels or more) is "extremely remote". Minor oil spills (spills less than 1000 barrels), according to the Navarin Basin FEIS, "tend to be caused by human error or carelessness and can be considered potentially mitigable; for example, by better training or operation procedures." Even if an oil spill occurred, the trajectory analysis in the Oil Spill Risk Analysis (OSRA) and the OSCP for the proposed exploration project indicated a less than 0.5 percent probability that the spill would contact the Pribilof Islands area.

Bering Strait Villages

The effects on subsistence resources used by Bering Strait villages is discussed in the Navarin FEIS (Sale 83 area) Section IV.B.c.2. Effects on large marine mammals could be expected from noise disturbance from offshore oil and gas activities and oil spills. The FEIS states that "from the standpoint of subsistence species abundance, there appears to be little cause for concern".

(2). *Potential to reduce availability of resources by alteration of their normal distribution patterns.*

Distribution patterns of subsistence resources are described in the Navarin FEIS (Sale 83 area) and in the St. George FEIS (Sale 70 area) and St. George DEIS (Sale 89 area).

Host Communities

Unalaska and Cold Bay. No reduction in availability of resources by alteration of their normal distribution patterns would be expected because no facilities are to be constructed and the increases in air and vessel traffic would be small and temporary.

St. Paul and St. George. Normal distribution patterns could potentially be altered by oil spills and air and vessel traffic noise. The low probability of oil spills, the limited number of aircraft and vessels, and the limited duration of proposed use leads to a conclusion that no reduction in availability of resources by alteration of their normal distribution patterns would be expected.

Bering Strait Villages

The Navarin FEIS (Sale 83 area) states that "momentary noise disturbance of bowhead whales, walrus, or seals either passing through the area south of St. Lawrence Island or resident in the area is more likely with the proposal, but these disturbances are not likely to divert these marine mammals from their normal migration routes". The OSCP and OSRA (Navarin Basin FEIS (Sale 83 area) [*sic*] results for the St. Lawrence Island area (the closest of the group to the proposed exploration wells) indicate low probabilities of contact. Therefore, in conclusion, as stated in the Navarin FEIS, "subsistence resources are relatively abundant and distribution patterns of whales and walrus are expected to be relatively unaffected by the operations associated with the proposal (Lease Sale 83), given sufficient noise suppression measures are enforced during spring and summer months".

(3). *Limitations of access to subsistence resources.*

Subsistence use areas are described in the Navarin FEIS (Sale 83 area) and in the St. George FEIS (Sale 70 area) and St. George DEIS (Sale 89 area).

Access to subsistence resources should not be significantly affected by the proposed project. Access to fishery and marine mammal resources is via boats and as long as normal marine safety practices are followed no limitations on marine access would be expected. Access to terrestrial animals and birds should not be affected because no new facilities are proposed for Unalaska, Cold Bay, or any of the Bering Strait villages, and the new facilities proposed at the St. Paul airport should not limit access.

b. *Availability of Other Lands.*

Within or around the Navarin Basin lease area, there are no other lands that could be used for the proposed exploration plan at the present time. The use of St. Matthew Island, which is not used for subsistence purposes, is unavailable at this time due to legal challenges to its use as a forward support base.

In regard to alternative drilling sites, as stated in the ER, "based upon available information, there is no indication that any particular well site in the leased areas would be preferred over another based solely on biological criteria."

c. *Other Alternatives.*

Alternatives to the proposed action are discussed in Appendix H, of the St. George Basin FEIS (Sale 70 area), entitled "Alternative Energy Sources as an Alternative to the OCS Program."

2. *Findings*

Significant restrictions are differentiated from insignificant restrictions by a process assessing whether the action undertaken will have no slight effect as opposed to large or substantial effects. No significant restriction results when there would be no or a slight reduction in the abundance

of harvestable resources and "occasional" predistribution of these resources.

In light of this definition the determination of significant restriction must be made on a reasonable basis, since it must be decided in light of the total subsistence lands and water resources that are available to individuals in the surrounding areas, living a subsistence lifestyle.

This evaluation demonstrates that no significant restriction of subsistence uses is reasonably foreseeable from the proposed EP in the Navarin Basin.

IV. ALTERNATIVES TO THE PROPOSED ACTION

A. *NO ACTION*

No action would require disapproval of the activity as proposed. Under existing laws and terms of the lease, the Department Of Interior must positively respond to legitimate requests to drill on valid leases, provided all terms and conditions are met. In light of the above, no action is not considered to be a reasonable alternative.

B. *RELOCATION OF DRILL SITE*

Relocation of the proposed drill sites to different parts of the lease would be an alternative. Based on available data, no increase in the possibility of locating hydrocarbons or decrease in potential environmental impacts would result. The lease sale decision was made and the leases were issued for the purpose of oil and gas exploration and production should commercial discoveries be made.

V. UNAVOIDABLE ADVERSE ENVIRONMENTAL EFFECTS

A. *UNCONTROLLED OIL FLOW*

The probability of encountering hydrocarbons at any depth which could cause a blowout is reduced by drilling the proposed wells according to the Alaska OCS Orders and utilizing standard well control equipment and procedures. The casing and cementing programs (Alaska OCS Order No. 2) and subsequent abandonment requirements (Alaska OCS Order No. 3) are designed to prevent leakage and contamination of fluids within a permeable zone.

APPENDIX L

STATUTE INVOLVED

1. Section 102 of ANILCA, 16 U.S.C. 3102, provides in relevant part:

As used in this Act (except that in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act, and the Alaska Statehood Act)—

(1) The term "land" means lands, waters, and interests therein.

(2) The term "Federal land" means lands the title to which is in the United States after the date of enactment of this Act.

(3) The term "public lands" means land situated in Alaska which, after the date of enactment of this Act, are Federal lands, except—

(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act.

(4) The term "conservation system unit" means any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter.

2. Section 801 of ANILCA, 16 U.S.C. 3111, provides:

The Congress finds and declares that –

(1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;

(2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;

(3) continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management;

(4) in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is neccessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents; and

(5) the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require that an administrative structure be established for

the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.

3. Section 805 of ANILCA, 16 U.S.C. 3115, provides, in relevant part:

(a) Except as otherwise provided in subsection (d) of this section, one year after the date of enactment of this Act, the Secretary in consultation with the State shall establish—

(1) at least six Alaska subsistence resource regions which, taken together, include all public lands. The number and boundaries of the regions shall be sufficient to assure that regional differences in subsistence uses are adequately accommodated;

(2) such local advisory committees within each region as he finds necessary at such time as he may determine, after notice and hearing, that the existing State fish and game advisory committees do not adequately perform the functions of the local committee system set forth in paragraph (3)(D)(iv) of this subsection; and

(3) a regional advisory council in each subsistence resource region.

Each regional advisory council shall be composed of residents of the region and shall have the following authority:

(A) the review and evaluation of proposals for regulations, policies, management plans, and other matters relating to subsistence uses of fish and wildlife within the region;

(B) the provision of a forum for the expression of opinions and recommendations by persons interested in any matter related to the subsistence uses of fish and wildlife within the region;

(C) the encouragement of local and regional participation pursuant to the provisions of this title in the decision-

making process affecting the taking of fish and wildlife on the public lands within the region for subsistence uses;

(D) the preparation of an annual report to the Secretary which shall contain—

(i) an identification of current and anticipated subsistence uses of fish and wildlife populations within the region;

(ii) an evaluation of current and anticipated subsistence needs for fish and wildlife populations within the region;

(iii) a recommended strategy for the management of fish and wildlife populations within the region to accommodate such subsistence uses and needs; and

(iv) recommendations concerning policies, standards, guidelines, and regulations to implement the strategy. The State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of this subsection may provide advice to, and assist, the regional advisory councils in carrying out the functions set forth in this paragraph.

(b) The Secretary shall assign adequate qualified staff to the regional advisory councils and make timely distribution of all available relevant technical and scientific support data to the regional advisory councils and the State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of subsection (a).

(c) The Secretary, in performing his monitoring responsiblity pursuant to section 806 and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be

detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.

(d) The Secretary shall not implement subsections (a), (b), and (c) of this section if within one year from the date of enactment of this Act, the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 803, 804, and 805, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this title for the taking of fish and wildlife on the public lands for subsistence uses. Laws establishing a system of local advisory committees and regional advisory councils consistent with section 805 shall provide that the State rulemaking authority shall consider the advice and recommendations of the regional councils concerning the taking of fish and wildlife populations on public lands within their respective regions for subsistence uses. The regional councils may present recommendations, and the evidence upon which such recommendations are based, to the State rulemaking authority during the course of the administrative proceedings of such authority. The State rulemaking authority may choose not to follow any recommendation which it determines is not supported by substantial evidence presented during the course of its administrative proceedings, violates recognized principles of fish and wildlife conservation or would be detrimental to the satisfaction of rural subsistence needs. If a recommendation is not adopted by the State rulemaking authority, such authority shall set forth the factual basis and the reasons for its decision.

4. Section 810 of ANILCA, 16 U.S.C. 3120, provides:

(a) In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such

actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—

(1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 805;

(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

(b) If the Secretary is required to prepare an environmental impact statement pursuant to section 102(2)(C) of the National Environmental Policy Act, he shall provide the notice and hearing and include the findings required by subsection (a) as part of such environmental impact statement.

(c) Nothing herein shall be construed to prohibit or impair the ability of the State or any Native Corporation to make land selections and receive land conveyances pursuant to the Alaska Statehood Act or the Alaska Native Claims Settlement Act.

(d) After compliance with the procedural requirements of this section and other applicable law, the head of the appropriate Federal agency may manage or dispose of public lands under his primary jurisdiction for any of those uses or purposes authorized by this Act or other law.

5. Section 815 of ANILCA, 16 U.S.C. 3125, provides in relevant part:

Nothing in this title shall be construed as—

* * * * *

(4) modifying or repealing the provisions of any Federal law governing the conservation or protection of fish and wildlife, including the National Wildlife Refuge System Administration Act of 1966 (80 Stat. 927; 16 U.S.C. 668dd-jj), the National Park Service Organic Act (39 Stat. 535, 16 U.S.C. 1, 2, 3, 4), the Fur Seal Act of 1966 (80 Stat. 1091; 16 U.S.C. 1187), the Endangered Species Act of 1973 (87 Stat. 884; 16 U.S.C. 1531-1543), the Marine Mammal Protection Act of 1972 (86 Stat. 1027; 16 U.S.C. 1361-1407), the Act entitled "An Act for the Protection of the Bald Eagle", approved June 8, 1940 (54 Stat. 250; 16 U.S.C. 742a-754), the Migratory Bird Treaty Act (40 Stat. 755; 16 U.S.C. 703-711), the Federal Aid in Wildlife Restoration Act (50 Stat. 917; 16 U.S.C. 669-669i), the Fishery Conservation and Management Act of 1976 (90 Stat. 331; 16 U.S.C. 1801-1882), the Federal Aid in Fish Restoration Act (64 Stat. 430; 16 U.S.C. 777-777K), or any amendments to any one or more of such Acts.

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STATEMENT OF THE CASE

Amici adopt petitioners' statements of the case as set out in their petitions for writ of certiorari.

SUMMARY OF ARGUMENT

1. Amici adopt and incorporate herein by reference petitioners' arguments on the ability of trial courts to exercise equitable discretion in granting injunctive relief as articulated by this Court in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

2. Amici adopt and incorporate herein by reference petitioners' arguments on the proper construction of Section 810 of ANILCA, 16 U.S.C. § 3120, within the context of the tiered decision-making process of the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1331, *et seq.*, as prescribed by this Court in *Secretary of the Interior v. California*, 464 U.S. 312 (1984).

3. The Ninth Circuit's pronouncement that Congress decided in ANILCA to prefer the protection of subsistence resource use over environmentally sound, expeditious OCS energy development is without foundation in legislative history and contrary to expressed congressional intent.

ARGUMENT

LEGISLATIVE HISTORY CLEARLY ESTABLISHES THAT CONGRESS HAS NOT CHOSEN TO PREFER SUBSISTENCE USE INTERESTS OVER REASONABLE OCS DEVELOPMENT

In reaching its decision in *People of the Village of Gambell v. Hodel*, 774 F.2d 1414, the Ninth Circuit appears to engage in the traditional analysis of the propriety of granting or withholding injunctive relief.[1] In so doing, the court passes on its assessment of the competing public interests then before the court. *Id.* at 1425-26. In a section of its public interest analysis dealing with this Court's decision in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, the Ninth Circuit reaches the wholly unexpected conclusion that "[i]t appears to us that in enacting section 810, Congress has chosen the protection of subsistence life over oil exploration."[2] Having reached this conclusion in order to bolster its *per se* injunction rule by appealing to this Court's decision in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the Ninth Circuit repeats this assertion and even amplifies it in its conclusion:

> "The public interest as expressed by Congress in the 1980 amendments to the Conservation Act [*i.e.*, ANILCA] requires that the uses and needs of the Alaskan Natives, and our national concern over survival of their culture, must *prevail over our possible energy needs.* Thus, the denial of a preliminary injunction was error because the court misapplied the

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[1] *See People of the Village of Gambell v. Hodel*, 774 F.2d at 1419-28, for the court's treatment of the usual factors of: (1) probable success on the merits; (2) balance of harms; and (3) public interest.

[2] *Id.* at 1426 n.2.

> law of the circuit concerning the 'unusual circumstances' exception and failed to honor *the announced policy of Congress favoring the rights of Alaskan Natives over this nation's need to exploit the potential oil resources under the waters of the outer continental shelf off the shores of Alaska.*" *People of the Village of Gambell v. Hodel*, 774 F.2d at 1428 (emphasis added).

The assertion of a congressional preference for subsistence use preservation is thus central to the court's decision. Such an assertion is ungrounded in legislative history, and is, in fact, directly contrary to expressed congressional intent.

Senate Report No. 413, 96th Cong., 2nd Sess. 5, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, sets out the text with commentary of the legislation that eventually became ANILCA. In discussing the amendments made by the Senate Committee on Energy and Natural Resources to the text of the House of Representatives' bill, H.R. 39, the report notes:

> "The second amendment [to Section 810] clarifies that the requirements of Section 810 are '*procedural*' in that until the requirements of the section have been satisfied the proposed action may not proceed, but once the requirements of the section are satisfied and incorporated into existing land use planning processes *the proposed action may proceed even though its effect may be adverse to subsistence uses.*" *Id.* at 5178 (emphasis added).

The Ninth Circuit's decision in *People of the Village of Gambell v. Hodel, supra,* is utterly and inexplicably silent on this language. The court, quoting itself in *People of the Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984), noted that Section 810(a) was enacted " 'to benefit

the Natives,' and to be 'consistent with the Congressional policy established by section 802(1) that the management of the public lands shall cause the least adverse impact possible on rural residents who depend upon subsistence uses.' " *People of the Village of Gambell v. Hodel,* 774 F.2d at 1425, citing *People of the Village of Gambell v. Clark,* 746 F.2d at 581, *quoting,* 126 Cong. Rec. 29,279 (1980). Consistency and benefit do not amount to a substantive preference in the face of congressional language unavoidably establishing the *procedural* character of the section.

Congress established a procedural requirement that subsistence uses be integrated into the decision-making processes of federal land managers in Alaska. Congress foresaw that even after taking subsistence uses into consideration, there would be occasions when subsistence uses could be adversely affected.[3] There is no support whatsoever for the position of the Ninth Circuit that Congress intended by Section 810 to create a substantive preference for the protection of subsistence uses over the environmentally sensitive provision of this country's vital energy needs.

CONCLUSION

In reaching its decision in *People of the Village of Gambell v. Hodel, supra,* interpreting the relationship between the requirements of Section 810(a) of ANILCA, 16 U.S.C. § 3120(a), and the Outer Continental Shelf Lands

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[3] 1980 U.S. Code Cong. & Ad. News 5178.

Act Amendments of 1978, and announcing its *per se* rule of mandatory injunctive relief for a *prima facie* violation of an environmental or conservation statute, the Ninth Circuit relied on a mistaken assessment of national policy concerning Alaskan subsistence uses as indicated by congressional intent. This mistaken assessment has had serious negative impacts on amici, and because of the continuing possibility for erroneous construction of national policy should the Ninth Circuit's position not be corrected, amici respectfully urge this Court to grant the writs of certiorari requested by petitioners.

DATED: March, 1986.

Respectfully submitted,

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No. 85-1406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE

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QUESTION PRESENTED

Whether the Ninth Circuit standard requiring a determination of the likelihood of success on the merits and a balance of the comparative harms in situations involving an agency's evaluation of the environmental impact of a proposed action is consistent with the exercise of equitable discretion mandated by the holding of *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982).

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BRIEF OF AMICUS CURIAE

STATE OF CALIFORNIA ex rel. JOHN K. VAN DE KAMP, ATTORNEY GENERAL

Amicus respectfully submits this brief, pursuant to Rule 36.4 of the Rules of the Supreme Court, in support of the respondent, the People of the Village of Gambell.

INTERESTS OF AMICUS

The State of California views this case as one concerning only the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3101-3233 (1982). Nonetheless, the Solicitor General in his Petition for Certiorari has presented an issue concerning the applicable standard for the issuance of an injunction so broadly that it implicates amicus's statutory and common law authority to safeguard the public interest of Californians and protect the State's natural resources. *See* Cal. Const. art. V, § 13; Cal. Gov't Code sections 12511, 12600-12; *D'Amico* v. *Board of Medical Examiners,* 11 Cal.3d 1, 14-15, 112 Cal. Rptr. 786, 520 P.2d 10 (1974).

In an attempt to state an issue of sufficient importance to warrant the grant of certiorari, the Solicitor General attacks the Ninth Circuit's language setting forth the standard for issuance of an injunction under ANILCA as applicable to all environmental statutes. Amicus's interest results from the Solicitor General's broad statement of the issue, his attempt to affect all environmental statutes, and his mischaracterization of the Ninth Circuit standard as a per se rule requiring injunctions in all cases. Enforcement of statutes such as the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4337 (1982), affects California significantly, and amicus has played an important role in cases involving interpretation of such statutes. *E.g., California ex rel. Van de Kamp* v. *Tahoe Regional Planning Agency,* 766 F.2d 1308 (9th Cir. 1985); *California* v. *Watt,* 712 F.2d 584 (D.C. Cir. 1983); *California* v. *Block,* 690 F.2d 753 (9th Cir. 1982); *NRDC* v. *Hodel,* 618 F.Supp. 848 (E.D. Cal. 1985).

Because the Solicitor General states the issue as involving all environmental statutes, amicus submits this brief solely to discuss the relation of the standard for injunctions used in *People of the Village of Gambell* v. *Hodel,* 774 F.2d 1414 (9th Cir. 1985), and this Court's holding in *Weinberger* v. *Romero-Barcelo,* 456 U.S. 305 (1982).

REASONS FOR DENYING THE PETITION

The Ninth Circuit standard for the issuance of an injunction in cases involving violations of environmental statutes requires a determination of the balance of irreparable harms. Rather than create a "per se rule" or a mechanical grant of injunction, the Ninth Circuit standard affords protection to the objectives of environmental statutes while allowing flexibility for dealing with unusual cases. As such, the standard is consistent with *Weinberger* v. *Romero-Barcelo,* 456 U.S. 305 (1982), and the cases of other circuits. The Solicitor General's characterization of the standard as an unyielding directive is without basis.

a. The Solicitor General contends that the Ninth Circuit's injunction standard for violation of environment statutes "*requires* the issuance of a preliminary injunction without any consideration of the competing equities" and that it creates an "unprecedented per se injunction rule." Petition of Solicitor General at 12 (emphasis in original). In fact, the Ninth Circuit standard expressed in *People of the Village of Gambell* v. *Hodel,* 774 F.2d 1414 (9th Cir. 1985) (*Gambell*), requires a balancing of harms and equities, as evidenced by the Ninth Circuit cases, including *Gambell,* which employ the test. *See Tenakee Springs* v. *Block,* 778 F.2d 1402, 1407-08 (9th Cir. 1985); *Steamboaters* v. *FERC,* 777 F.2d 1384, 1385-86 (9th Cir. 1985); *Save Our Ecosystems* v. *Clark,* 747 F.2d 1240, 1250 (9th Cir. 1984); *Forelaws on Board* v. *Johnson,* 743 F.2d 677, 685-86 (9th Cir. 1984); *American Motorcyclist Association* v. *Watt,* 714 F.2d 962, 966 (9th Cir. 1983); *Alpine Lakes Protection Society* v. *Schlapfer,* 518 F.2d 1089, 1090 (9th Cir. 1975) (*see* discussion *infra*).

In *Gambell,* the court applied a standard to the irreparable harm balance under ANILCA that it had previously applied to cases arising under NEPA: Where plaintiff shows a strong likelihood of success on the merits, an injunction will issue unless defendant can show unusual circumstances. *Gambell,* 774 F.2d at 1422-23. Because the district court failed to articulate unusual circumstances and because none was evident on the record, the circuit court determined that an injunction

was appropriate in light of the villagers' probable success on the merits as a result of the ANILCA violation. 774 F.2d at 1423, 1424. Rather than applying a per se rule or following a calculus designed to invariably require an injunction, as the Solicitor General suggests, the *Gambell* court considered the facts presented and weighed them with respect to the equities. 774 F.2d at 1423-25.

The Solicitor General really quarrels with the facts in *Gambell*, not with the Ninth Circuit balancing standard: "[t]he Secretary's lease sale plan poses the type of danger to the subsistence culture of Alaska Natives that moved Congress to enact section 810(a) of [ANILCA];" "the district court erred in finding that this is the type of rare or unusual case that justifies denial of a preliminary injunction. . . ."; and "[t]he by-products of oil and gas exploration . . . pose the threat of disruption to subsistence economy sufficient to destroy irreparably the isolated and unique culture of the native Alaskans." 774 F.2d at 1424, 1426.

The Supreme Court decision in *Romero-Barcelo* precludes the mechanical grant of an injunction for every violation of law where the statute does not completely foreclose the exercise of the court's discretion. 456 U.S. at 313, 320; *see TVA* v. *Hill*, 437 U.S. 153, 193 (1978); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). The Ninth Circuit's standard, consistent with *Romero-Barcelo*, requires the weighing of equities,

> "authoriz[ing] the court not only to weigh the relative hardship and harms to the parties, but to examine how the greater public interest may be affected in the unusual case where enjoining government action allegedly in violation of [an environmental statute] might actually jeopardize resources."

Gambell, 774 F.2d at 1424, *quoting American Motorcyclist Association* v. *Watt*, 714 F.2d at 966.

This balance mandates, rather than forecloses, the exercise of equitable discretion. In *Romero-Barcelo*, the Court, reviewing the Navy's release of ordnance from aircraft into navigable waters as the basis for an injunction under the Federal Water

Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1982), pointed to the district court's determination that (1) the Navy's control of the release area probably constituted a positive factor in the area's ecology, and (2) because of the Navy's important training functions, injunctive relief would cause grievous harm to the welfare of the Navy and the nation. 456 U.S. at 97 & n. 4. The Ninth Circuit's formulation envisions consideration of exactly such factors.

In *American Motorcyclist* v. *Watt*, 714 F.2d at 966, the court determined that "public concerns other than the failure to comply with NEPA must be weighed in determining whether to grant an injunction." The court in *American Motorcyclist*, citing *Romero-Barcelo*, denied the injunction for fear of resultant permanent damage to fragile desert resources after determining that the district court properly engaged in the "required weighing" and consideration of the public interest. *Id.* at 966-67. Similarly, in *Alpine Lakes Protection Society* v. *Schlapfer*, 518 F.2d at 1090, the Ninth Circuit denied a NEPA injunction because it would lead to timber damage and insect infestation, a harm which the court found, on balance, outweighed the possible reduction of the area's wilderness characteristics. In *Forelaws on Board* v. *Johnson*, 743 F.2d at 686, the court, following its usual balance of equities, denied an injunction as inappropriate in light of disruption of long-term contracts entered into pursuant to another federal act that mandated their implementation with "a certain amount of urgency." These cases obviously do not reflect a per se rule requiring injunctions.

In cases granting injunctions as well, the Ninth Circuit considers the balance of harms. In *Steamboaters* v. *FERC*, 777 F.2d at 1385-86, the court weighed the presumption of harm resulting from a NEPA violation against "the public interest in promoting small hydro-power projects." The court concluded that the NEPA violation weighed more heavily after determining that Congress had not set a time schedule for specific projects as it had done with respect to the contracts considered in *Forelaws on Board*. *See also Save Our Ecosystems* v. *Clark*,

747 F.2d at 1250.* In light of these cases, the Solicitor General's description of the Ninth Circuit's environmental statute injunction standard as a per se rule requiring the grant of an injunction is simply incorrect.

b. By presenting the Ninth Circuit's environmental statute injunction standard as a per se rule, the Solicitor General determines that the "rule" conflicts with other circuits' decisions where those decisions state that harms must be "balanced." Solicitor General's Petition at 19-20. The "conflict" results from the Solicitor General's misstatement of the Ninth Circuit standard as a per se rule. In all of the cases cited by the Solicitor General, the circuit courts have concluded, like the Ninth Circuit, that the objectives of environmental statutes must be considered "to the fullest extent possible" in the balance of harms equation. *E.g., Wisconsin* v. *Weinberger,* 745 F.2d 412, 426 (7th Cir. 1984); *Realty Income Trust* v. *Eckerd,* 564 F.2d 447, 456 (D.C. Cir. 1977) (presumption of injunction for NEPA violation).

In *Massachusetts* v. *Watt,* 716 F.2d 946, 952 (1st Cir. 1983), for example, the court found that "without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent [is] suffered," and that function of NEPA must receive consideration in the balance of harms. Even in *Alaska* v. *Andrus,* 580 F.2d 465, 485-86 (D.C. Cir.), *vacated in part on other grounds as moot sub nom. Western Oil & Gas Association* v. *Alaska,* 439 U.S. 922 (1978), which the *Gambell* court distinguished as applying a different test, the District of Columbia Circuit acknowledged the presumption in favor of injunction in NEPA cases, noting that "it is possible and reasonable for the courts to insist on strict compliance with NEPA. . ." 580 F.2d at 485, *quoting Jones* v. *District of*

* The Solicitor General also cites *Thomas* v. *Peterson,* 753 F.2d 754, 764 (9th Cir. 1985), as an application of the per se rule. In fact, the *Thomas* injunction issued pursuant to the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982), the same Act that this court found mandated an injunction. *See TVA* v. *Hill,* 437 U.S. 153, 193 (1978). Because *Thomas* involved the procedural requirements of the ESA, the Ninth Circuit applied its balancing formula to that situation as well, determining that the balance favored the grant of an injunction. 753 F.2d at 764-765.

Columbia Redevelopment Land Agency, 499 F.2d 502, 513 (D.C. Cir. 1974). *See Foundation for Economic Trends* v. *Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985) (NEPA creates "an extremely important statutory requirement to serve the public and agency *before* major federal action occurs") (emphasis in original).

As the Ninth Circuit formulates it:

> The purpose of enjoining government action pending preparation of the environmental impact statement is, generally, to maintain the *status quo* while additional environmental data is obtained, in order to preserve the decision makers' opportunity to choose among policy alternatives.

Forelaws on Board, 743 F.2d at 685. The Ninth Circuit's environmental statute injunction standard is designed to effect that purpose while enabling the court to weigh the equities and grant or deny an injunction as the facts dictate. The balance is evidenced both in the Ninth Circuit opinions in which the court denies injunctions and in those in which the court grants injunctions. The Ninth Circuit's standard remains consistent with *Romero-Barcelo*.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: April 22, 1986

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(5) (8)

Nos. 85-1239 and 85-1406

Supreme Court, U.S.
FILED
JUL 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

AMOCO PRODUCTION COMPANY, ET AL, PETITIONERS

v.

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITIONS FOR A WRIT OF CERTIORARI FILED JANUARY 22, 1986 (NO. 85-1239), AND FEBRUARY 21, 1986 (NO. 85-1406)
CERTIORARI GRANTED JUNE 2, 1986

85 PM

In the Supreme Court of the United States

OCTOBER TERM, 1986

Nos. 85-1239 and 85-1406

AMOCO PRODUCTION COMPANY, ET AL, PETITIONERS

v.

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

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PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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* The relevant opinions of the district court and the court of appeals, the judgment of the court of appeals, and several relevant items from the record are printed in the appendix to the petition for a writ of certiorari in No. 85-1406, and have not been reproduced.

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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

A85-184CIV

THE PEOPLE OF THE VILLAGE OF GAMBELL,
AN ALASKAN NATIVE IRA ASSOCIATION,
PEOPLE OF THE VILLAGE OF STEBBINS,
AN ALASKAN NATIVE IRA ASSOCIATION,
PLAINTIFFS

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND THE
UNITED STATES DEPARTMENT OF THE INTERIOR

ARCO ALASKA INC., EXXON CORP. MOBIL
OIL CORP., SHELL OIL CO., TEXACO INC.
AND UNION OIL OF CALIFORNIA,
DEFENDANT-INTERVENORS

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
3/4/83	1	Complaint For Preliminary And Permanent Injunctive Relief Filed.
	6	Filed Motion For An Order Granting A Preliminary Injunction.
	7	Filed Memorandum In Support Of Plaintiffs' Request For A Preliminary Injunction.
		Issued Summons to U.S. DEPT OF INTERIOR, JAMES WATT, UNITED STATES OF AMERICA C/O U.S. ATTY, UNITED STATES OF AMERICA C/O US ATTY ANCH

DATE	NR	PROCEEDINGS
3/10/83	12	Filed Motion For Leave To Intervene As Defendants.
	15	Filed Statement Of Federal Defendants' Non-Opposition To Motion For Leave To Intervene As Defendants.
	16	Filed Statement Of Plaintiffs' Non-Opposition To Motion For Leave To Intervene As Defendants.
	17	Filed Defendant-Intervenors' Answer To Complaint.
3/14/83	21	Filed Order Denying Preliminary Injunction.
	22	Filed Plaintiff's Notice Of Appeal.
3/16/83	24	Filed Memorandum Of Defendant-Intervenors In Opposition To Motion For Preliminary Injunction with Exhibit 1—The "FEIS" Exhibit 2—Secretarial Issues Document, Exhibit 3—The "DEIS", Exhibit 4—Final Notice Of Sale, Exhibit 5—Consistency Determination accompanying same.
3/17/83	32	Filed Motion To Dismiss.
	33	Filed Federal Defendant's Memorandum In Support Of Motion To Dismiss And In Opposition To Motion For Preliminary Injunction.
	35	Filed Plaintiff's Reply To Memorandum Opposing Their Motion For A Preliminary Injunction.
3/29/83	43	Filed Plaintiff's Motion For Summary Judgment.
	44	Filed Plaintiff's Memorandum In Support Of Their Motion For Summary Judgment with exhibits D, E, F, G, H, I and J attached.

DATE	NR	PROCEEDINGS
4/1/83	46	Filed Memorandum Of Defendant-Intervenors In Opposition To Plaintiffs' Motion For Summary Judgment with exhibits 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18
4/4/83	48	Filed Minute Order From Chambers setting oral argument on plt's motion for summary judgment for April 1, 1983 at 10:30 am.
4/4/83	49	Filed Court minutes of April 1, 1983 hearing of oral argument on Plaintiff's Motion for summary judgment.
4/4/83	52	Filed in Anchorage the court's Memorandum And Order denying Plt's motion for summary judgment as to both claims for relief.
4/7/83	54	Filed Federal Defendants' Response To Plaintiffs' Motion For Summary Judgment with Certificate of service and exhibits A thru E attached.
4/13/83	56	Filed Notice Of Appeal by plaintiffs, from Order Dismissing the Complaint. Cys to attys
	57	Filed Notice Of Appeal by plaintiffs, from Order Denying Summary Judgment. Cys attys
4/14/83	59	Filed Memorandum And Order granting summary judgment to federal defendants.
	60	Filed Judgment granting summary judgment to federal defendants, copies distributed to attorney. Case closed
	62	Filed plt's Application For Order Granting Injunction Pending Appeal.

DATE	NR	PROCEEDINGS
4/14/83	63	Filed Memorandum In Support Of Plaintiffs' Application For Injunction Pending Appeal. (lodged order)
	66	Filed Federal Defendants' Memorandum In Opposition To Plaintiff's Motion For Injunction Pending Appeal, with certificate of service attached.
	67	Filed Memorandum Of Defendant-Intervenors In Opposition To Plaintiff's Motion For Injunction Pending Appeal with exhibit 1 and Affidavit Of Service By Hand Delivery attached.
	69	Filed Memorandum And Order denying pltf's mtn for an injunction pending appeal.
4/18/83	71	Fld CA Order enjoining appellees from awarding any leases on Lease Sale 57; oral argument set 11 am on 4-26-83 in SF—cy: Judge
5/17/83	77	Fld CA Order denying application for injunction; set briefing schedule—cy: judge
1/8/85	84	Fld JUDGMENT from CA w/attach opinion affirming D.C. in part, reversed in part and remanded. Cy: Joan Lee, Donald Cooper, Cynthia Pickering, Carl Bauman & Judge von der Heydt.
4/3/85	85	Fld pltfs' mot for prelim injunct on remand w/atch memo & exhibits (exhibits in red folder behind case file).
4/19/85	90	Fld intvnr/defts' memo in opp to mot for prelim injunct w/atch exhibits.
4/23/85	91	Fld fed defts' opp to mot for prelim injunct w/atch exhibits.

DATE	NR	PROCEEDINGS
5/1/85	93	Fld intvnr/defts' notice of filing orig afdvt of Hugh P. Bushnell.
5/2/85	96	Fld pltfs' resp to defts' opp to mot for prelim injunct w/atch exhibits.
5/9/85	102	Fld D-3 to D-8s' mot for leave to file intervenor's response re plts' reply w/attach response & affs.
5/23/85	103	Fld cy MEMO & ORDER re A85-201/A85-184 CIV, pltf mot for PI DENIED. cy-cnsl.
5/24/85	104	Fld pltf's Notice of Appeal re Order of 5/23/85, dkt#103. cc: cnsl.
5/30/85	105	Fld MO granting inter-defts' mot for leave to file add material. cc: cnsl.
5/30/85	106	Fld MO stating court will not entertain mot for stay pending appeal. cc: cnsl.
1/3/86	111	FLD CA Judgment. Remanded & reversed. cy: James Bamberger, Bruce Landon, Carl Bauman, Judge von der Heydt.
1/8/86	112	Fld PRELIM INJUNCTION. No bond required at this time. Cy Cnsl & A85-201 CIV. Cy O&J 2685.
1/31/86	113	Fld joint mot for stay.
1/31/86	113	Fld ORDER approving joint mot for stay. Cy Cnsl.

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

A85-201CIV

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND NUNAM KITLUSISTI, A NATIVE INTERTRIBAL ORGANIZATION, PLAINTIFFS

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS

AMOCO PRODUCTION CO. ARCO ALASKA, INC., EXXON CORP., SHELL WESTERN E&P, INC., OHIO ALASKA PETROLEUM CO., TEXACO, INC., AND UNION OIL CO. OF CALIFORNIA, DEFENDANT-INTERVENORS

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
4/25/85	1	Fld cmplt. Issued summs.
4/25/85	2	Fld pltf mot for PI w/exhbs A-J (exhbs fld in red binders case file) w/memo.
4/25/85	3	Fld pltf req to consolidate this action w/A85-184 CIV.
5/6/85	4	Fld stip re application for intervention as defts & stip for ext of time for answer dedlne to match fed defts due date.
5/8/85	6	Fld fed defts oppo to pltf request to consolidate.
5/9/85	4	Fld ORDER granting intervention of add'l defts. cy cnsl

DATE	NR	PROCEEDINGS
4/9/85	7	Fld D-3 thru D-9 oppo to pltf mot for consolidation.
4/9/85	8	Fld pltf resp to deft oppo to req to consolidate.
4/10/85	9	Fld fed deft oppo to mot for PI w/exhbs (exhbs in red binder behind case file) (exhbs #2, #4, #5, #6-#10, no #1 or #3 fld)
4/10/85	11	Fld D-3 thru D-9 memo in oppo to pltf mot for PI affs & exhbs D, E, & F & G (exhbs fld in red binder behind case file)
4/17/85	12	Fld pltf resp to deft oppo to mot for PI w/exhbs.
4/17/85	13	Fld City of St. Paul mot for lv to file amicus curiae brief w/memo & exhb (table of contents of brief).
4/21/85	14	Fld MO; this case hereby assigned to Judge vdH. cy cnsl, Judge vdH.
4/23/85	17	Fld MEMO & ORDER; pltf mot for PI denied. cy cnsl, A85-184 CIV.
4/30/85	18	Fld MO; City of St. Paul's mot for lv to file amicus brief GRANTED, pltf mot to consol hrings of pnding mots for PI in A85-201/A85-184 GRANTED, cases otherwise not consol. cy cnsl.
4/30/85	19	Fld MO; crt will not entertain mot for stay pending appeal. cy cnsl, A85-184.
6/24/85	20	Fld D-1 & D-2's answer.
7/2/85	22	Fld D-3 thru D-9 answer
7/19/85	22	Fld Desig. of record by Intervenor-Appellee Amoco Prod. Co.
7/30/85		Record mailed to 9CAA
1/8/86	26	Fld cert cy PRELIM INJUNC. No bond required at this time. Cy Cnsl & O&J 2685.

DATE	NR	PROCEEDINGS
1/31/86	27	Fld defts' joint mot for stay.
2/3/86	27	Fld ORDER granting stay until 3 weeks after U.S. Supreme Court decides whether it will accept certiorari on decision of 9th Circuit. cc:cnsl

IN THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE NINTH CIRCUIT

85-3877

PEOPLE OF THE VILLAGE OF GAMBELL, PEOPLE OF THE VILLAGE OF STEBBINS, AND NUNAM KITLUTSISTI, APPELLANTS

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, APPELLEES

ARCO ALASKA, INC., AMOCO PRODUCTION CO., ET AL., INTERVENOR-APPELLEES

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
6/3/85	DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL. EMK
6/3/85	Filed aplt's emergency motion for injunction pending appeal. (CIVATT) 6/1 -dmf-
6/3/85	Filed aplees' (Amoco Production, et al) memorandum in opposition to motion for injunction pending appeal. (CIVATT) 6/3 -dmf-
6/4/85	Filed federal aplees' opposition to motion for injunction pending appeal. (CIVATT) 6/4 -dmf-
6/5/85	Filed order (SNEED, NELSON, BEEZER) Exploration of the Alaska Continental Shelf pursuant to Lease Sales No. 57 and No. 83 by the intervenors-appellees oil companies is temporarily stayed pending further order of the court. sm Misc. MoCal 6/5

DATE	PROCEEDINGS
6/6/85	Filed order (SNEED, NELSON, NORRIS) Plaintiff's emergency motion for injunction pending appeal is denied. The temporary stay entered June 5, 1985, has expired. Within 7 days of the entry of this order, the Secretary of the Interior, in conjunction with the intervenors-appellees, shall file with the court a hold harmless agreement that will protect appellants from any consequences resulting from significant restrictions upon subsistence uses by appellants of their lands. See U.S.C. 3120. This panel shall retain jurisdiction of the matter for the purpose of reimposing a temporary stay should the panel disapprove the form and substance of the hold harmless agreement. Upon submission for decision, the merits panel shall determine whether the hold harmless agreement should remain in effect. This appeal is expedited. No prebriefing conference will be held. Appellants shall file their opening brief on or before June 28, 1985. Appellees shall file their answering briefs on or before July 19, 1985. Appellants may file a reply brief within 7 days of the service date of appellee's briefs. No extensions of time will be granted. The Clerk shall calendar this case for oral argument in Seattle in September. sm
6/12/85	Filed aplt's waiver of add'l briefing, request for immediate transfer to merits panel, and request for immediate argument, (6/11), (CIVATT). jw
6/13/85	Filed aple's & Secretary of Interior's Hold Harmless Agreement, (CIVATT). jw
6/17/85	Filed aplt's objection to "Hold Harmless Agreement" (CIVATT) 6/14 -dmf-

DATE	PROCEEDINGS
6/18/85	Rec'd affidavit of Joseph G. Jorgensen in support of aplts' objection to "Hold Harmless Agreement." (CIVATT) -dmf-
6/18/85	Filed federal aplees' opposition to aplts' request for immediate transfer to merits panel and request for immediate payment. (CIVATT) 6/17 -dmf-
6/19/85	File intervenor-aplees' response to aplts' objection to "Hold Harmless Agreement." (CIVATT) 6/18 -dmf-
6/20/85	Rec'd affidavit of Charles C. Hughes, Phd., in support of objection to "Hold Harmless Agreement." (CIVATT) -dmf-
6/21/85	Filed feder aple's response to aplt's objection to hold harmless agreement, (6/20/85), (CIVATT). jw
6/21/85	Filed order (SNEED, NELSON, NORRIS) The panel has reviewed the hold harmless agreement submitted on June 13, 1985, by the Secretary of the Interior, in conjunction with the intervenor-appellees, in compliance with this court's June 6, 1985 order. The panel has concluded that, with two exceptions, the hold harmless agreement is adequate to protect appellants' interests at this stage of the proceedings. The panel that decides this appeal on its merits may review the agreement to determine its continued adequacy. This panel makes the following two changes in the agreement: (1) Paragraph 4 is amended to provide that appellants have the initial burden to establish only that a significant restriction upon subsistence uses has been proximately caused by exploratory drilling or related operations of intervenors-appellees. Once ap-

DATE	PROCEEDINGS
	pellants have established the existence of a subsistence restriction, the burden shall shift to intervenors-appellees to establish that the responsibility lies with a particular company or companies. If intervenors-appellees are unable to do so, then all companies conducting operations in the relevant lease area of the type that caused the restriction shall be jointly and severally liable for damages to appellants. (2) Paragraph 7 is amended to provide that the hold harmless agreement shall remain in effect until further order of this court. Appellants' waiver of additional briefing, request for immediate transfer to merits panel, and request for immediate argument are denied. The parties shall abide by the briefing schedule established in the June 6, 1985 order. sm
7/1/85	Filed as of June 28, orig & 15 Aplt's opening briefs and 5 excerpts of record in 2 volumes. (38 pages). 6/27 tu
7/9/85	Filed, as of Jul 5, intervenor-aplees' (Arco Alaska & Exxon) petition for clarification or reconsideration of order dated 6/21/85. (CIVATT) 7/5 -dmf-
7/22/85	Filed order (NELSON, NORRIS) The motion by intervenor-appellees for clarification or reconsideration of this court's order of June 21, 1985, is granted in part. Paragraph 7 of the hold harmless agreement remains intact in all respects except as to the time for termination of the agreements. As directed in the June 21 order, paragraph 7 is amended to provide that the hold harmless agreement shall remain in effect until further order of this court. In all other respects, the motion for clarification or reconsideration is denied without prejudice to

DATE	PROCEEDINGS
	renewal of the motion before the panel that considers this case on its merits. sm
7/23/85	Filed as of 7/22, orig and 15 copies of aple's (FEDERAL) brief, (50 pgs), 7/19. (PANEL).
7/23/85	Filed as of 7/22, orig and 15 copies of aple's (AMOCO PRODUCTION) brief and 5 copies of aple's supplemental excerpts of record, (in 2 volumes), (49 pgs), 7/19, (PANEL). jw
7/25/85	Filed motion (City of St. Paul) for leave to file amicus brief/memorandum in opposition. (panel) 7/23 -dmf-
7/30/85	Filed 5 copies of aplt's corrected excerpts, vol. 1 jw (DO NOT USE EXCERPTS VOL. JUNE 28, 1985)
8/1/85	Rec'd as of 7/31, orig and 15 copies of aplt's reply brief, (32 pgs), (7/30, (PANEL).
8/5/85	Filed order (DEPUTY CLERK) The City of St. Paul's motion to file an amicus brief/memorandum in opposition to appellants' motion for preliminary injunction is GRANTED. sm
8/23/85	Filed aplee's motion fixing the expiration date of the hold harmless agreement. (panel) 8/22 -dmf-
8/28/85	Filed "Stipulation" that the Hold Harmless Agreement filed by federal defendants and intervenors appellees, Amoco Production, et al will terminate to (panel). jr 8/26/ & 27/85
9/4/85	CAUSE ARGUED & SUBMITTED TO: PREGERSON, ALARCON, CJJ, DIMMICK (W. WASH.), DJ. -dmf-
10/25/85	ORDERED OPINION (ALARCON) FILED AND JUDGMENT TO BE FILED AND ENTD.

DATE	PROCEEDINGS
10/25/85	FILED OPINION – REVERSED AND REMANDED. jw (Judge Dimmick Dissenting)
10/25/85	FILED AND ENTERED JUDGMENT. jw
11/7/85	Filed stipulated motion for limited stay of the mandate (PANEL) sm
12/3/85	Rec'd, as of 11/29/85, intervenor/aples letter dated 11/27/85 re: stipulated motion for limited stay of mandate, etc to (panel). jr
12/26/85	Filed order (Pregerson, Alarcon & Dimmick) the stipulated motion for limited stay of mandate filed 11/7/85 is dismissed as moot. The mandate in the above-entitled case shall be filed forthwith.
12/26/85	Mandate Issued

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. N 83-03-Civil

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND THE PEOPLE OF THE VILLAGE OF STEBBINS, AN ALASKAN NATIVE IRA ASSOCIATION, PLAINTIFFS,

v.

JAMES S. WATT, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS.

COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

INTRODUCTION

1. This action seeks to enjoin the Secretary of the Interior, James S. Watt, from holding Outer Continental Shelf Lease Sale 57. That lease sale will offer oil and gas companies about 2.4 million acres of Outer Continental Shelf land. The OCS land is located in Norton Sound. The lease sale is scheduled for March 15, 1983.

2. The complaint sets out two alternative legal theories why Secretary Watt should be enjoined from holding the sale. Both theories are based on the subsistence rights of Natives living in the Norton Sound region. The first theory is that Mr. Watt did not follow the procedures required by Section 810 of the Alaska National Interest Lands Conservation Act. This section provides a detailed set of procedures that must be followed before Secretary Watt leases public lands.

3. The second legal theory is based on the Alaska Native Claims Settlement Act. ANCSA terminated certain Native hunting and fishing rights. The language of ANCSA, and the historical connection binding it to Section 810 of ANILCA, establish that the rights extinguished by ANCSA are the same rights protected by Section 810. If Section 810 does not apply to OCS land, ANCSA does not apply. In this case, the Natives retain aboriginal claims to the OCS land, which must be adjudicated before any lease sale can take place.

PARTIES

4. Plaintiff Native Village of Gambell and Plaintiff Native Village of Stebbins are Indian tribes or bands organized under the Indian Reorganization Act. 28 USC § 461 *et. seq.* The governing bodies of these villages are recognized by the Secretary of the Interior. The Native village of Gambell is located on St. Lawrence Island. The Native village of Stebbins is located on the Southern shore of Norton Sound on Cape Stephens.

5. Defendant James S. Watt is the Secretary of the Interior. He officially resides in the District of Columbia. The Department of the Interior is the federal agency responsible for Lease Sale 57.

JURISDICTION AND VENUE

6. This action arises under the Constitution, laws, and treaties of the United States. It involves claims in excess of $10,000. Jurisdiction is based on 28 USC § 1331; 28 USC § 1332; 28 USC § 1337; 28 USC § 1346; and 28 USC § 1362. Venue properly lies in the District Court of Alaska under 28 USC § 1391(b); 28 USC § 1391(e)(2); and 28 USC § 1391(e)(3).

STATEMENT OF THE CASE

7. The Bureau of Land Management published a Notice of Sale for Outer Continental Shelf Lease Sale 57 on February 10, 1983. The notice announces that 418 blocks of land will be offered for oil and gas lease. The blocks consist of 2.4 million acres of Outer Continental Shelf land located off the Alaskan coast. The lease sale is scheduled for March 15, 1983. It will permit successful bidders to explore for, develop, and produce oil and gas.

8. The lease sale and the resulting oil development will injure the subsistence economy of the Norton Sound region. The subsistence economy is the process by which Natives harvest local fish and game and then directly consume it, exchange it on local trade networks, or sell it for cash. The subsistence economy is essential for the continued existence of Natives living in the Norton Sound basin. For example, over ninety percent of the diet of villagers living in Gambell consists of locally-harvested walrus and other marine mammals, and the remainder of the diet is largely composed of other subsistence animals.

9. Oil and gas development will harm the subsistence economy in two ways. It will reduce the animal populations forming the basis of the subsistence economy. And it will decrease the Natives' ability to purchase equipment needed to harvest the resource. These two effects will diminish the output of the subsistence economy, threatening the existence of Native villagers.

10. Secretary Watt has not followed the procedures outlined in Section 810 of the Alaska National Interest Lands Conservation Act in preparing the Norton Sound lease sale. Section 810 is designed to protect the subsistence economy which supports Alaskan Natives. It requires the Secretary to make certain findings and to effectuate certain procedures before leasing or disposing of public lands.

11. Members of the Plaintiff organizations, and their lineal ancestors, have used and occupied substantial portions of the lands to be conveyed in the Norton Sound lease sale. The Plaintiffs claim traditional hunting and fishing rights. These rights include the right to hunt seal, walrus, and whale, and the right to fish for herring and salmon.

12. The tribal councils of the Plaintiff villages have not consented to the leases affecting the land owned, used, or occupied by them.

First Cause of Action

13. Secretary Watt has not followed the procedures or made the findings required by Section 810 of the Alaska National Interest Lands Conservation Act. This failure injures the Plaintiffs' interest.

Second Cause of Action

14. Secretary Watt intends to lease lands encumbered by Native claims. The lease would injure the plaintiffs' possessory interest, and would violate the trust responsibilities Secretary Watt owes to the Alaskan Natives.

RELIEF

The plaintiffs request the following relief:

1. That this court issue a preliminary injunction enjoining Secretary Watt from leasing the Norton Sound basin until such time as:

a. He makes the findings and determinations required by Section 810 of ANILCA or, alternatively;

b. This court adjudicates Native claims to the Norton Sound basin.

2. That Secretary Watt and his subordinates be permanently enjoined from leasing the Norton Sound basin.

3. That the plaintiffs be awarded costs and attorneys fees.

Respectfully submitted,

ALASKA LEGAL SERVICES CORPORATION

by: /s/ DONALD COOPER

Donald Cooper
Bruce Horowitz
Joan Lee
Robert Hickerson
Heather Noble
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. 985-201 CIV

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND NUNAM KITLUSISTI, A NATIVE INTERTRIBAL ORGANIZATION, PLAINTIFFS,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs in this action, the Native Village of Gambell and Nunam Kitlusisti, seek to permanently enjoin all activities resulting from Federal Oil and Gas Lease Sale 83 for the Navarin Basin, Alaska. Plaintiffs also seek an Order declaring Sale 83 to be invalid and any leases resulting from that sale to be null and void.

2. Plaintiffs raise two arguments in support of their claim that Sale 83 is invalid. First, the Secretary of the Interior failed to comply with the requirements of section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120, in selecting the areas offered in Sale 83. The second argument is that Title VIII and section 810 of ANILCA impose a trust responsibility on the Secretary to minimize the impact of oil and gas leasing, exploration, and development on Native subsistence activities. By leasing lands of low or marginal oil and gas potential, the Secretary breached this trust responsibility.

3. Plaintiffs seek to invalidate Sale 83 and leases resulting from that sale in order to protect their subsistence hunting and fishing rights. In holding Sale 83, the Secretary of the Interior ignored congressional directives that he lease in a manner that caused the least adverse impact on subsistence. Oil exploration and development activities on the leased tracts present an unreasonable threat of injury to primary subsistence resources needed by residents of St. Lawrence Island and western Alaska.

PARTIES

4. Plaintiff Native Village of Gambell is an Indian tribe or band reorganized under the Indian Reorganization Act as amended, 25 U.S.C. § 461 *et seq.*. The governing body of this village is recognized by the Secretary of the Interior. The Native Village of Gambell is located on St. Lawrence Island in the Bering Sea.

5. Plaintiff Nunam Kitlusisti is a non-profit corporation organized under the laws of the State of Alaska. It represents subsistence users throughout the Yukon-Kuskokwim Delta of southwest Alaska, working on resource development and environmental issues which affect their subsistence way of life. Nunam Kitlusisti is governed by a Board of Directors nominated by constituent Yukon-Kuskokwim villages. Its offices are located in Bethel, Alaska.

6. Defendant Donald P. Hodel is the Secretary of the Interior. He is the official successor to William P. Clark, who was Secretary of the Interior at the time Lease Sale 83 was held. Secretary Hodel is responsible for administering the Outer Continental Shelf leasing program established pursuant to the Outer Continental Shelf Lands Act as amended, 43 U.S.C. § 1331 *et. seq.*. Defendant Donald P. Hodel officially resides in Washington, D.C.

JURISDICTION AND VENUE

7. This action arises under the Constitution, laws, and treaties of the United States. Jurisdiction is proper under 28 U.S.C. § 1331; 28 U.S.C. § 1337; 28 U.S.C. § 1346; 28 U.S.C. § 1362; and 16 U.S.C. § 3120. Venue properly lies in the District Court for the District of Alaska under 28 U.S.C. § 1391(b), (c), and (e).

STATEMENT OF THE CASE

8. On March 16, 1984, the Secretary of the Interior published notice of his intent to sell some 3,700 blocks in the Navarin Basin southwest of St. Matthew Island in the Bering Sea. 49 Fed. Reg. 10,058 (March 16, 1984). The sale was held on April 16, 1984. As a result of this sale, some 185 leases were issued to successful bidders.

9. The Navarin Basin is home to many primary subsistence resources consumed by residents of Gambell and the coastal villages of the Yukon-Kuskokwim Delta region. Among other things, it is the winter feeding ground of the bowhead whale, an endangered species central to the subsistence culture of the people of Gambell. The migration routes of various species of marine mammals, fish, and migratory birds traverse the Navarin Basin area. These marine mammals, fish, and migratory birds provide more than 80% of the food consumed by residents of Gambell and villages in the Yukon-Kuskokwim region.

10. Oil and gas exploration and development in the Navarin Basin will harm the subsistence economies of Gambell and the villages of the Yukon-Kuskokwim Delta region. The subsistence economy is the process by which Alaskan Natives harvest local fish and game and then directly consume it, exchange it on local trade networks, or sell it for cash. For the people of Gambell and the villages of the Yukon-Kuskokwim Delta region, the subsistence economy is essential for their survival.

11. Oil and gas exploration and development will harm the subsistence economies of the affected villages in a number of ways. For example, oilspills will directly injure marine mammals, fish, and migratory birds needed for subsistence; noise from exploration and development activities will cause subsistence resources to alter their traditional migration patterns, thereby reducing their availability for subsistence users; and inflation caused by oil and gas activity will decrease Natives' ability to purchase equipment needed to harvest subsistence resources.

12. The Secretary of the Interior did not follow the requirements of section 810 of the Alaska National Interest Lands Conservation Act in preparing for Lease Sale 83. Section 810 is designed to protect rural Alaskan Natives' opportunity to pursue their customary and traditional subsistence way of life.

13. In the context of OCS leasing, section 810 of ANILCA requires the Secretary to:

(a) perform detailed subsistence impact studies;
(b) select areas to be leased in a manner that minimizes the conflict between oil and gas and subsistence; and
(c) determine whether leasing any of the offered areas may significantly restrict subsistence uses or resources, and if it may, the Secretary must:
    (1) give notice and hold hearings in the affected areas,
    (2) consult with local fish and game advisory committees, and
    (3) make specific detailed findings regarding the impact of the proposed lease sale on subsistence uses and resources.

14. Title VIII of ANILCA was passed for the benefit of Alaskan Natives. It imposes a trust responsibility on the Secretary to manage lands, including the OCS, in a manner that will cause the least adverse impact on Native subsistence users and resouces.

FIRST CAUSE OF ACTION

15. The Secretary of the Interior did not comply with section 810 of ANILCA in determining to offer the 3,700 blocks for lease in the Navarin Basin. As such, the sale was unlawful, and the leases resulting from that sale are invalid.

SECOND CAUSE OF ACTION

16. By failing to comply with the section 810 requirement that he select blocks in a manner designed to minimize the conflict between oil and gas activities and subsistence, the Secretary breached his trust obligation to ensure that oil and gas activities cause the least adverse impact on subsistence uses and resources.

PRAYER FOR RELIEF

17. Plaintiffs request the following relief:

(a) That this court enter an Order enjoining the Secretary from authorizing, permitting, or otherwise allowing any lessee from conducting any exploration or development activities on their Sale 83 lease(s);

(b) That this court enter an Order declaring Sale 57 to be null and void and any leases resulting therefrom to be equally invalid;

(c) That this court enter an Order awarding plaintiffs their costs and reasonable attorneys fees; and;

(d) That this court grant plaintiffs such other relief as would be just and equitable.

Respectfully submitted this 25th day of April, 1985.

ALASKA LEGAL SERVICES CORPORATION

/s/ JAMES A. BAMBERGER

James A. Bamberger
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. N83-003-Civil

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND THE PEOPLE OF THE VILLAGE OF STEBBINS, AN ALASKAN NATIVE IRA ASSOCIATION, PLAINTIFFS,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS.

ARCO ALASKA, INC., *et al.*, DEFENDANT-INTERVENORS.

AFFIDAVIT OF EARL D. STOUT
EXHIBIT E

AFFIDAVIT OF EARL D. STOUT

THE STATE OF TEXAS
COUNTY OF HARRIS

The undersigned affiant, Earl D. Stout, personally appeared before me, Charles Raymond LeMay, Notary Public in and for the County of Harris, state of Texas, on this 17th day of April 1985, and deposes and states to the best of his information and belief:

1.

I am the Manager of the Alaska/Pacific Exploration Division of Exxon Company, U.S.A., a division of Exxon Corporation. In this capacity, I supervise all of Exxon's offshore exploration programs in Alaska and the Pacific, including the area covered by Sale 57 in the Norton Sound.

I have held this position since the spring of 1982, and am thus intimately familiar with Exxon's Norton Sound activities since the inception of this lawsuit.

2.

Exxon acquired 41 leases at Sale 57, in March of 1983, at a cost in excess of $258,000,000. Geological and geophysical costs and lease rentals raise the net bonus cost of acquisition by in excess of $12,400,000.

3.

During the summer of 1983, Exxon engaged in site clearance, a type of seismic activity, of roughly ten blocks on which it considered, at that time, that exploratory drilling might possibly occur during the 1984 exploration season. During the summer of 1984, Exxon continued its Norton exploration by drilling two exploratory wells, at a cost of approximately $16,000,000, on its Sale 57 leases. Exxon also conducted a seismic program on its Norton leases during the 1984 open water season. Exxon conducted all of this exploration in complete compliance with all applicable laws and regulations governing OCS activities, under plans and permits approved by the agencies responsible for implementing the statutory scheme. To the best of my knowledge and belief, no adverse effects whatsoever, whether environmental or economic, have resulted from any of the industry activity, nor has any party complained of any such adverse effects as a result of exploratory activities since the sale occurred in 1983.

4.

During the 1985 drilling season, Exxon plans to drill two additional wells on its Norton leases. Both well locations are in the St. Michael Protraction Area; one is on Block 54

and the other on Block 361. According to the Environmental Impact Statement for Sale 57 and the draft for the upcoming Sale 100, neither of these blocks is located in an area of particular environmental sensitivity. Both blocks are at least 24 miles from shore.

5.

Exxon plans to begin drilling the first of these wells on or near June 1. Commencement of the second is currently planned for mid to late July. Present estimates require a minimum of 45 days to drill each well, with further time required for testing should hydrocarbons be encountered. Time is of the essence due to the limited drilling window available in Alaska; because of the seasonal and climatic operating conditions in the Norton Sound, any delay will preclude the drilling of the second well. Inability to proceed to the drilling of the second well during the 1985 season as currently scheduled may, because of lost efficiencies related to timing, render the drilling of the second well at a later date uneconomic. Such inability to expeditiously evaluate the vital national resource reserves potentially underlying these Norton leases will cause enormous waste not only to Exxon as a company, but to the public at large as well.

6.

Exxon's Plan of Exploration (POE) and accompanying Environmental Report for its Sale 57 leases received the approval of the Minerals Management Service (MMS) on December 28, 1983. The state of Alaska approved Exxon's certification that all activities conducted under the POE would be conducted consistently with the Alaska Coastal Management Program on April 25, 1984. Applications for Permits to Drill (APDs) the two wells planned for the 1985 season were filed with the MMS on February 21 and March 20, 1985 pursuant to 30 C.F.R. § 250.36. Approval

of the APDs is expected in the next few weeks. Publication of the final National Pollutant Discharge Elimination System (NPDES) Permit for the Norton Sound area is expected imminently. Issuance of this permit and approval of the Applications for Permit to Drill are the sole remaining regulatory procedures required prior to Exxon's spudding of the first well planned.

7.

The only seismic activity planned relative to exploration of Exxon's Sale 57 leases consist of site clearance of three blocks preparatory to the drilling of the two exploratory wells described above. This seismic work is necessary to clear the area of any potential sea floor instabilities and to ensure safe operating conditions on the lease block in question. Bottom coring "shallow" geologic surveys and the "high resolution" seismic programs which use a small energy source are required pursuant to the OCS Orders governing operations on the Alaska OCS. (Alaska OCS Region, OCS Order 2.1.3.) "High resolution" seismic programs, with their small energy source, have a far more limited range than the "deep seismic" surveys which companies typically perform prior to a lease sale to determine the presence of potential hydrocarbon-bearing structures.[1]

8.

Should drilling be delayed, and as a function of any delay, Exxon will face losses which now approximate $4,000,000, and which will rise to nearly $10,000,000 by May 30, 1985, from existing contract commitments alone.

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[1] Exxon (as well as other companies) may also conduct deeper seismic in the Norton area in preparation for OCS Sale 100. These operations are not related to Exxon's current exploration of its Sale 57 tracts.

Upon departure of the drilling rig from Seward, currently scheduled for May 23, Exxon's exposure, in the event of any delay, will escalate dramatically by at least $2,275,000. These cancellation and damages costs will be in addition to the even larger, and potentially immeasurable, losses that Exxon will suffer if unable to evaluate the oil and gas potential of its already enormous investment, in the form of lease bonuses, rental payments, 1984 drilling costs, geological and geophysical expenditures, and the time value of money associated with all of the above, in its Norton Sound leases.

9.

For all of the above reasons, since any delay caused by issuance of a preliminary injunction will result in enormous and irreparable damage, Exxon should be allowed to proceed, as scheduled and without delay, in its 1985 exploration of its Sale 57 leases in Norton Sound.

/s/ EARL D. STOUT,
Earl D. Stout, Affiant

SUBSCRIBED TO AND SWORN BEFORE ME THIS 17TH DAY OF APRIL 1985, AT HOUSTON, HARRIS COUNTY, TEXAS.

/s/ CHARLES RAYMOND LEMAY
Notary Public, State of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A85-184-Civil

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND THE PEOPLE OF THE VILLAGE OF STEBBINS, AN ALASKAN NATIVE IRA ASSOCIATION, PLAINTIFFS,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS.

ARCO ALASKA, INC., *et al.*, INTERVENOR-DEFENDANTS.

AFFIDAVIT OF HUGH P. BUSHNELL

AFFIDAVIT OF HUGH P. BUSHNELL

THE STATE OF TEXAS
COUNTY OF HARRIS

The undersigned affiant, Hugh P. Bushnell, personally appeared before me, Vicky Jackson, Notary Public in and for the County of Harris, state of Texas, on this 30th day of April 1985, and deposes and states to the best of his information and belief:

1.

I am the Operations Manager of the Alaska/Pacific Exploration Division of Exxon Company, U.S.A., a division of Exxon Corporation. In this capacity, I supervise all of Exxon's offshore exploration operations in Alaska and the Pacific, including the area covered by Sale 57 in the Norton Sound. I have held positions within the Alaska/Pacific

Division since the summer of 1978, and am thus intimately familiar with Exxon's Norton Sound activities since the inception of this lawsuit.

2.

Exxon acquired 41 leases at Sale 57, in March of 1983, at a cost in excess of $258,000,000. Geological and geophysical costs and lease rentals raise the net bonus cost of acquisition by in excess of $12,4000,000.

3.

During the summer of 1983, Exxon engaged in site clearance, a type of seismic activity, of roughly ten blocks on which it considered, at that time, that exploratory drilling might possibly occur during the 1984 exploration season. During the summer of 1984, Exxon continued its Norton exploration by drilling two exploratory wells, at a cost of approximately $16,000,000, on its Sale 57 leases. Exxon also conducted a seismic program on its Norton leases during the 1984 open water season. Exxon conducted all of this exploration in complete compliance with all applicable laws and regulations governing OCS activities, under plans and permits approved by the agencies responsible for implementing the statutory scheme. To the best of my knowledge and belief, no adverse effects whatsoever, whether environmental or economic, have resulted from any of the industry activity, nor has any party complained of any such adverse effects as a result of exploratory activities since the sale occurred in 1983.

4.

During the 1985 drilling season, Exxon plans to drill two additional wells on its Norton leases. Both well locations are in the St. Michael Protraction Area; one is on Block 54

and the other on Block 361. According to the Environmental Impact Statement for Sale 57 and the draft for the upcoming Sale 100, neither of these blocks is located in an area of particular environmental sensitivity. Both blocks are at least 24 miles from shore.

5.

Exxon had originally planned to begin drilling the first of these wells on or near June 1, with the second planned for mid to late July. An unusually harsh Alaska winter, resulting in a later than normal ice break-up in the Norton Sound, has pushed the projected spud date for the first Norton well to mid-June and that of the second well to late July or early August. Estimates require a minimum of forty-five (45) days to drill each well, with further time required for testing should hydrocarbons be encountered. As this year's ice conditions demonstrate, time is of the essence in scheduling exploratory activities in Alaska. Seasonal and climatic operating conditions result in an already naturally limited drilling window. Any further delay will preclude the drilling of the second well. Inability to proceed to the drilling of the second well during the 1985 season as currently scheduled may, because of lost efficiencies related to timing, render the drilling of the second well in another season uneconomic. Such inability to expeditiously evaluate the vital natural resource reserves potentially underlying these Norton leases will cause enormous waste not only to Exxon as a company but to the public at large as well.

6.

Should drilling be further delayed, and as a function of any delay, Exxon faces losses which now approximate $4,210,000, and which will rise to nearly $10,000,000 by mid-June, from outstanding contract commitments alone. Upon departure of the drilling rig from Seward, Exxon's

exposure, in the event of further delay, will escalate dramatically by at least $2,275,000. This departure date, originally scheduled for May 16, has already been delayed until early June, as outlined above, due to the delay in commencement of the Norton open water season. These cancellation and damage costs will be in addition to the even larger losses that Exxon will suffer if unable to evaluate the oil and gas potential of its already enormous investment, in the form of lease bonuses, rental payments, 1984 drilling costs, geological and geophysical expenditures, and the time value of money associated with all of the above, in its Norton Sound leases.

7.

Each day that Exxon endures the uncertainty associated with the pending preliminary injunction motion entails ever increasing losses resulting from the perpetuation of existing commitments. Exposure due to these commitments could be significantly minimized, were the court to issue its decision on the pending motion expeditiously. Savings to Exxon which would result from an expedited decision approach $21,000 on a per diem basis. Conversely, with each day of uncertainty and delay, Exxon invests yet another $21,000 in its Norton Sound leases.

8.

For all of the above reasons and in the interest of economy, efficiency, and equity, Exxon requests that an expedited decision be issued in the case.

/s/ HUGH P. BUSHNELL,
Hugh P. Bushnell, Affiant

SUBSCRIBED TO AND SWORN BEFORE ME THIS 30TH DAY OF APRIL 1985, AT HOUSTON, HARRIS COUNTY, TEXAS.

/s/ VICKY JACKSON
Notary Public, State of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A85-201 Civil

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND NUNAM KITLUTSISTI, A NATIVE INTERTRIBAL ORGANIZATION, PLAINTIFFS,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS.

AMOCO PRODUCTION COMPANY, ET AL., INTERVENOR-DEFENDANTS.

AFFIDAVIT OF EARL D. STOUT
EXHIBIT A

AFFIDAVIT OF EARL D. STOUT

The State of Texas
County of Harris

The undersigned affiant, Earl D. Stout, personally appeared before me, Charles Raymond LeMay, Notary Public in and for the County of Harris, state of Texas, on this 8th day of May 1985, and deposes and states to the best of his information and belief:

1.

I am the Manager of the Alaska/Pacific Exploration Division of Exxon Company, U.S.A., a division of Exxon Corporation. In this capacity, I supervise all of Exxon's

petroleum exploration programs for onshore and offshore Alaska including the area covered by Outer Continental Shelf (OCS) Lease Sale 83—Navarin Basin. I have held this position since the spring of 1982 and am thus intimately familiar with Exxon's participation in Sale 83 and its planned exploration activities in the Navarin Basin.

2.

I participated in and actually supervised the bidding process employed by Exxon's Alaska/Pacific Division in connection with Sale 83. As a result of Exxon's efforts, it was awarded 61 leases at Sale 83, which was held on April 17, 1984, for a net bonus and rentals cost in excess of $167,000,000. Exxon's pre-lease sale costs (geological and geophysical data acquisition and processing, overhead, research, and evaluation) associated with Sale 83 make Exxon's total net acquisition cost approximately $208,000,000.

3.

Immediately following Sale 83, Exxon initiated preparatory activities necessary to allow it to permit exploratory drilling in the 1985 drilling season. During the summer of 1984, Exxon conducted site clearance activities, a type of shallow seismic survey, over two geologic prospects (roughly 14 lease blocks) in the Navarin Basin on which Exxon was considering exploratory drilling during the 1985 exploration season. These site clearance activities cost Exxon approximately $1,138,000. At the same time, Exxon arranged for preparation of an environmental report and orientation program required by Minerals Management Service (MMS) regulations (30 C.F.R. § 250.34) and a stipulation included in the leases granted to Exxon. To date, Exxon has paid more than $59,000 for the preparation of this program. On November 21, 1984,

Exxon submitted its Navarin Basin Plan of Exploration (POE), Environmental Report, and emergency response plans to the MMS in Anchorage.

4.

I am informed that following Exxon's submission of its POE on November 21, 1984, the MMS, on November 28, 1984, deemed Exxon's POE completed and forwarded it to the state of Alaska and other federal agencies for review. I am further informed that the MMS notified local communities, individuals, and groups who have previously expressed an interest in reviewing and commenting on exploration plans for the Navarin Basin, including Nunam Kitlusisti, of the submission of Exxon's POE. On December 28, 1984, the MMS, after preparing an Environmental Assessment which included an evaluation under Section 810 of ANILCA, approved Exxon's POE within the thirty (30)-day review period proscribed by the Outer Continental Shelf Lands Act, as amended, (OCSLA). Subsequently, on January 14, 1985, the state of Alaska after considering comments by Nunam Kitlusisti, the cities of St. Paul and Nome, and the Bering Straits Coastal Resource Service Area Board concurred in Exxon's finding that the proposed activities are consistent with the Alaska Coastal Management Program (ACMP) which specifically includes consideration of subsistence uses.

5.

Upon receipt of MMS's approval of Exxon's POE, Exxon proceeded to implement its 1985 Navarin Basin drilling program. This program includes an initial well on Exxon's Redwood Prospect (OCS-Y 0559) with contingency plans to drill a second well on this prospect (OCS-Y 0592) depending on the results of the inital well. Exxon is

planning to commence its first well on or about June 4, 1985. To accomplish this drilling program, Exxon has had to commit to contracts for, among other things, the construction of a supply base on St. Paul Island, a support barge, helicopters, supply boats, and a drilling vessel. Exxon estimates that if its 1985 Navarin drilling program is enjoined by the Court, it will cost Exxon approximately $20,450,000 as of April 29, 1985, and that these costs will continue to escalate until June 4, 1985 when Exxon will be obligated to pay a total of approximately $23,250,000 in either cancellation or operating charges even though Exxon is precluded from commencing its operations. In the event, Exxon's 1985 drilling operations are delayed rather than cancelled, it will still incur operating charges of approximately $123,000 per day of delay. Any such delay also increases the possibility that Exxon's drilling program will be conducted during inclement weather and that the cost of this drilling program will dramatically escalate. In addition to Exxon's own drilling program, we are also negotiating to participate in up to three additional 1985 Navarin Basin wells to be drilled and operated by two other oil companies. Exxon assumes these other companies will incur similar cancellation or operating charges if their 1985 Navarin Basin drilling programs are cancelled or delayed as a result of the injunction sought by the Village of Gambell and Nunam Kitlusisti.

6.

Exxon is also planning to conduct site clearance activities over three Navarin Basin geologic prospects (roughly 32 lease blocks) during the summer of 1985. Exxon anticipates that these shallow seismic activities will commence in June. Exxon is currently obligated to pay its seismic contractor's mobilization and demobilization costs

($220,000) plus a minimum contract payment equal to sixty (60) days of operations (approximately $1,133,000) for a total minimum contract cost of about $1,353,000.[1]

7.

In addition to these cancellation or operating charges, Exxon and the other oil companies planning to drill in the Navarin Basin in 1985 will effectively be deprived of a year of their ten-year oil and gas leases. Equally important, the cancellation of these 1985 Navarin Basin drilling programs will impede the national interest in the expeditious exploration of a very prospective frontier oil and gas basin.

8.

Exxon has received, to date, all of the state and federal approvals required to commence its 1985 drilling program with the exception of the final permit to drill. Exxon submitted its application for this permit to drill on March 26, 1985. Exxon will be submitting supplementary materials requested by the MMS in the next few days. Once these materials are received, it is my understanding that any delay in the issuance of this permit will be due solely to this suit.

For all of the above reasons and since any delay caused by issuance of a preliminary injunction will result in enormous and irreparable damage both to Exxon and the na-

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[1] Exxon is also planning to conduct a deep seismic survey in the Navarin Basin in preparation for OCS Sale 107, which is scheduled for September 1986. This deep seismic survey is not related to Exxon's current exploration of its Sale 83 tracts.

tional interest, Exxon should be allowed to proceed, as scheduled and without delay, with its 1985 exploration drilling program for its Sale 83—Navarin Basin leases.

/s/ EARL D. STOUT,
Earl D. Stout, Affiant

SUBSCRIBED TO AND SWORN BEFORE ME THIS 8TH DAY OF MAY 1985, AT HOUSTON, HARRIS COUNTY, TEXAS.

/s/ CHARLES RAYMOND LEMAY
Notary Public, State of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A85-201 Civil

THE PEOPLE OF THE VILLAGE OF GAMBELL, AN ALASKAN NATIVE IRA ASSOCIATION, AND NUNAM KITLUTSISTI, A NATIVE INTERTRIBAL ORGANIZATION, PLAINTIFFS,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS.

AMOCO PRODUCTION COMPANY, ET AL., INTERVENOR-DEFENDANTS.

AFFIDAVIT OF DANA B. GRANNELL
EXHIBIT B

AFFIDAVIT OF DANA B. GRANNELL

State of Alaska) ss.
Third Judicial District)

Dana B. Grannell, being first duly sworn, deposes and states to the best of his knowledge and belief that:

1. I am the South Alaska Regional Exploration Manager and acting Executive Vice President for Exploration Operations, ARCO Alaska, Inc. (ARCO). I am responsible for ARCO exploration decisions in Alaska and supervise exploration activities both onshore and offshore Alaska. Consequently, I am familiar with all of ARCO's activities relative to the Navarin Basin OCS Lease Sale 83 (Lease Sale 83) conducted on April 17, 1984.

2. ARCO acquired all or part of thirty (30) lease tracts at Lease Sale 83 at a cost to ARCO in excess of $61,600,000 (including first year rentals). Geological and geophysical costs incurred in preparation for the Sale were in excess of $17,000,000. These costs include seismic work done in the Basin and ARCO's share of a COST well drilled in the Lease Sale 83 area which was operated by ARCO.

3. During the summer of 1984 ARCO incurred additional expenses in performing site clearance work for two of its drilling prospects in the Lease Sale 83 area. This activity is in the nature of seismic work and represented an expenditure of just over $600,000. Such site clearance is a necessary prerequisite to drilling.

4. The lease purchase and associated activities described above represent an investment in excess of $79,000,000 in the Navarin Basin and includes considerable seismic and drilling experience in the area. As a Navarin operator, ARCO has successfully conducted several types of exploration activities, all of which were brought to conclusion without any indication of environmental, economic or other adverse impact to anyone or any resource. To the best of my knowledge, ARCO has never received a complaint of nor any direct evidence of any adverse effects occasioned by its exploration activities in the Navarin Basin.

5. During the coming summer, ARCO intends to continue its exploration effort in the Lease Sale 83 area. ARCO, as operator for a group of eight companies, is proceeding with plans to drill an exploration well on Block 637, Official Projection Diagram NP1-7. Because of the extreme remoteness of the lease tracts in the Navarin Basin, planning efforts for this well began early. The need to develop extensive logistical support, including the use of specialized transport such as long range helicopters and construction of a remote operations base has dictated that

certain commitments be made as early as last fall. In November 1984 and in January 1985 ARCO committed to contracts for helicopter support and the construction of an aviation support base on St. Paul Island. To date, those decisions represent a sunk cost of almost $2,000,000. Another $300,000 has been spent in the acquisition of permits, telecommunications, wellheads and drilling equipment. These costs would not be recoverable in the event drilling could not proceed.

6. As is the case with the other support requirements, negotiations for the use of a suitable offshore drilling rig commenced last December. Drill rig costs represent a major portion of the total cost of ARCO's well. After several months of effort, ARCO entered into a contract for a drill rig which is currently drilling a well offshore California. ARCO's Navarin plans are to a certain extent tied to the completion of the California well but it is anticipated that well will be completed this month. Upon completion, plans call for immediate mobilization of the drill rig from California to ARCO's Navarin site. Because of the expense of mobilization and the degree of availability of these specialized drill rigs, there is a penalty for termination of the drilling contract. Given the present time estimates and mobilization requirements, if ARCO were prevented at this time from drilling its Navarin well, a termination penalty would be incurred. This penalty could be as high as $1.8 million.

7. ARCO is otherwise fully prepared to proceed with its well. All applicable permits have been acquired or are in final processing. These include authorization to discharge under the National Pollutant Discharge Elimination System and ARCO's Application for Permit to Drill (APD) which is expected to be received shortly. ARCO's Plan of Exploration (POE) was approved by the Minerals Management Service on January 23, 1985 and the consistency determination required by the Alaska Coastal Management Program was received on March 28,

1985. The consistency determination process afforded the local Coastal Management planning agency, Cenaliulriit, the opportunity to review, comment and to make recommendations on ARCO's plan. Only after satisfying the concerns of Cenaliulriit, specifically including issues related to subsistence matters, did the State of Alaska render its consistency determination. It should be noted that the Director of Cenaliulritt, Mr. Harold Sparck, is also the Director of Plaintiff, Nunam Kitlusisiti.

8. Should drilling be delayed, ARCO faces the loss of approximately $4 million in sunk costs. Due to the nature of the drill rig contract additional money must be committed shortly for other support services. The actual timing of these commitments is dependent on the mobilization of the drill rig from California but with the anticipated schedule these will need to be made prior to the end of this month. The cost of all commitments necessary for the well will escalate rapidly with the departure of the drill rig for Alaskan waters. Cancellation costs and associated damages will doubtless exceed significantly the level of the sunk costs described above.

9. ARCO's investment in the Lease Sale 83 area is enormous and any delay in drilling occasioned by issuance of an injunction would represent a devastating loss and irreparable damage to ARCO. Given the nature of frontier exploration and the present state of the oil and gas industry, a lost opportunity in 1985 could lead to a loss of the entire investment. ARCO should be allowed to proceed without delay with its planned Navarin drilling in 1985.

/s/ DANA B. GRANNELL

Dana B. Grannell

SUBSCRIBED TO AND SWORN BEFORE ME THIS 8TH DAY OF MAY 1985, AT ANCHORAGE, ALASKA.

/s/ BARBARA HURLEY
Notary Public in and for Alaska
My Commission Expires: 7/23/88

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A85-201 Civil

THE PEOPLE OF THE VILLAGE OF GAMBELL,
AN ALASKAN NATIVE IRA ASSOCIATION,
AND NUNAM KITLUTSISTI, A NATIVE INTERTRIBAL
ORGANIZATION, PLAINTIFFS,

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR,
AND THE UNITED STATES DEPARTMENT OF THE INTERIOR,
DEFENDANTS.

AMOCO PRODUCTION COMPANY, ET AL.,
INTERVENOR-DEFENDANTS.

AFFIDAVIT OF R. J. CRISWELL
EXHIBIT C

AFFIDAVIT OF R. J. CRISWELL

R. J. CRISWELL, being duly sworn, deposes and states to the best of his knowledge, information, and belief as follows:

1. I am the Western Division Production Manager for Amoco Production Company (Amoco). In this capacity, I manage and direct all of Amoco's offshore exploratory drilling programs with respect to Alaska and the Pacific, including the area covered by OCS Lease Sale 83 (Navarin Basin) in the Bering Sea offshore the state of Alaska.

2. This affidavit describes Amoco's long-standing commitment and preparation activities for its scheduled exploratory drilling program during 1985 in the OCS Lease Sale 83 area. In addition, it discusses the irreparable

harms that could be incurred by Amoco and the public at large with the issuance of an injunction prohibiting the exploratory drilling program which has been in the planning stages for over a year and its imminent implementation.

A. OCS SALE 83 (NAVARIN BASIN) AREA

3. The Navarin Basin lies approximately 300 miles from St. Lawrence Island and 400 miles from the west coast of mainland Alaska in the Bering Sea. The exploratory wells planned for the 1985 drilling season will be located in some of the most remote U.S. OCS waters ever drilled for U.S. oil and gas exploration. Because of weather conditions, ice conditions and the remoteness of the Navarin Basin, the planning, logistics, and required investments for this exploratory operation are significant. In the Navarin Basin ice prohibits exploratory drilling for all but about 7 months a year, 25 knot winds are common in winter, and heavy fog is present during the summer months. Hostile sea conditions most of the year make operating in this area of the U.S. OCS expensive and very demanding.

B. AMOCO'S LEASES IN OCS SALE 83 (NAVARIN BASIN) AREA

4. The U.S. Department of the Interior (DOI) held OCS Sale 83 on April 17, 1984. At the sale Amoco, both individually and jointly with partners, submitted bids on 82 tracts offered for lease. DOI accepted the bids submitted with respect to 47 of the 82 tracts (14 of the 47 successful bids are located in a buffer zone created by DOI as a result of a boundary dispute between the U.S. and the U.S.S.R. These leases have yet to be awarded to Amoco pending final decision by DOI to accept and award the leases.) At the time the 33 non-buffer zone leases were accepted by DOI, Amoco paid the sum of $123,332,900

for lease bonuses. The sum of $45,171,266, represents bonuses which will be paid by Amoco for the remaining 14 buffer zone leases when DOI decides they can be accepted. Therefore, Amoco has committed the net total sum of $168,504,166 for bonuses when DOI ultimately accepts all Amoco leases in the Navarin Basin.

5. Prior to lease sale itself on April 17, 1984, Amoco spent several million dollars acquiring geophysical data, information and in the processing of such data for the Sale 83 area. The monies expended include data and information, but also professional evaluations, interpretations, computer time, drafting, research, management and supervision.

C. AMOCO'S 1985 EXPLORATORY DRILLING PROGRAM FOR OCS SALE 83 (NAVARIN BASIN) AREA

6. Amoco's plans for the 1985 drilling season are to begin the mobilization of equipment starting mid-May 1985 and to spud its first well during the first week of June, 1985. Amoco anticipates drilling between three (3) and four (4) wells during 1985 and an additional 3 wells during 1986 in this area.

All of the required equipment and supplies for this operation has already been contracted for or committed to by Amoco. The following is a summary of the major equipment areas required for the operation. Amoco is contractually committed to this equipment which is currently scheduled to be in the Navarin Basin during early June, 1985. The dollar amounts reflect the minimum monetary obligation incurred by Amoco if an injunction was entered prohibiting activity and equipment has to be demobilized or returned without being used during the short drilling season.

A. *Drilling Rigs*—$10,500,000

Amoco will operate two semi-submersible drilling rigs during the 1985 drilling season, the Odeco Ocean Odyssey and the Sedco 708. Current plans are for both rigs to be mobilized to the Navarin during early June, 1985. The dollar amount indicated represents Amoco's financial commitment pursuant to the contracts if the rigs are not mobilized to the Navarin Basin.

B. *Marine Support*—$12,000,000

A fleet of vessels will be required to support the two Amoco operated drilling rigs. A 63,000 DWT bulkcarrier is being modified to function as an offshore warehouse (wareship) and will be mobilized to the Navarin Basin area by June 1. Diesel fuel and water have been loaded on a 47,000 DWT product tanker which is also enroute to the Navarin Basin area and is expected to arrive by June 1.

Four supply boats are either currently enroute to the Navarin Basin area or will soon be enroute from areas around the world. Two additional boats, which will stand-by near each rig, are currently being fitted with oil spill and rescue equipment in Dutch Harbor, Alaska. All vessels are either presently under contract or committed to by Amoco. The dollar amount shown reflects Amoco's financial responsibility in the event that the program is cancelled on or before June 1, 1985.

C. *Air Support*—$9,509,000

Two Boeing BV-234 Chinook helicopters are under contract to support industry drilling operations in the Navarin this drilling season. A helibase has also been constructed on St. Paul Island, which will be the origin for all helicopter flights to the drilling rigs. The dollar amount shown represents Amoco's financial responsibility for the helicopters in the event the program is cancelled before the helicopters are utilized.

(2) (7)

Nos. 85-1239, 85-1406

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD P. HODEL, SECRETARY OF THE INTERIOR; and THE UNITED STATES DEPARTMENT OF THE INTERIOR,
AMOCO PRODUCTION COMPANY, et al.,

Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Nos. 85-1239, 85-1406

DONALD P. HODEL, SECRETARY OF THE INTERIOR; and
THE UNITED STATES DEPARTMENT OF THE INTERIOR,
AMOCO PRODUCTION COMPANY, et al.,

Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The tribal village of Gambell, the tribal village of Stebbins, and Nunam Kitlutsisti oppose the petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE

This case involves the hunting and fishing rights of Alaska's aboriginal people. The plaintiffs, here the respondents, seek to ensure that the statutory and common law protections for these

rights are applied fairly and consistently. Three in number, they are the tribal village of Gambell, the tribal village of Stebbins, and Nunam Kitlutsisti. The tribal villages of Gambell and Stebbins are federally recognized Indian Tribes organized under section 16 of the Indian Reorganization Act, 25 U.S.C. § 476. The village of Gambell is located on St. Lawrence Island, an island located near the Soviet Union in the Bering Sea. The village of Stebbins is located on the northeastern shore of the Yukon River Delta, bordering Norton Sound. Nunam Kitlutsisti is an intertribal organization representing 56 villages in the Yukon-Kuskokwim Delta. Literally the "defender of life and land," its purpose is to promote and protect the traditional hunting and fishing rights of its members.

All legal questions presented by this case involve two statutes. One is the Alaska Native Claims Settlement Act.[1] The other is Title VIII of the Alaska National Interest Lands Conservation Act.[2] Both affect the hunting and fishing rights of Alaskan Natives. The Claims Settlement Act extinguished Alaska Native aboriginal hunting and fishing rights "in Alaska." Title VIII of the Conservation Act protects the hunting and fishing rights extinguished by the Claims Act. Described as a "'settlement' of the Alaska Native aboriginal hunting and fishing rights seemingly extinguished by ANCSA,"[3] the Conservation Act protects Native hunting and fishing rights "in Alaska."

That these issues arise in a challenge to two OCS lease sales is both fitting and proper in light of the extensive use of sea areas by Alaska's aboriginal people. For about half the year, water up to 65 miles from the Arctic coast is frozen solid. During this period the Eskimo treat the ice as a mere extension of land. They build roads on the ice. They set up camps on it. Most importantly, they hunt and fish on it.[4] In fact, the ice and water have

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[1] Act of Dec. 18, 1971, Pub. L. No. 92-203, 85 Stat. 688, *codified at* 43 U.S.C. § 1601 et seq.

[2] Act of Dec. 2, 1980, Title VIII, Pub. L. No. 96-487, 94 Stat. 2371, *codified at* 16 U.S.C. § 3101 *et seq.*

[3] D. Case, ALASKA NATIVES AND AMERICAN LAWS 299 (1984).

[4] R. Nelson, HUNTERS OF THE NORTHERN ICE (1969).

traditionally yielded more resources to the Eskimo than the land. Along the Arctic coast the land is largely devoid of trees and other natural resources which can be used for housing or fuel. As a result, the Eskimo have relied on the sea to provide them with most of their food, clothing, fuel, and the basic materials for making hunting equipment such as kayaks and harpoons.[5] Immensely important, the sea is so central to the Eskimo that they recognize no sharp distinctions between land and water.

The hunting and fishing which occur in the coastal ice and water are critical to the well being of Alaskan Natives. Although the thought of fishing and hunting for one's sustenance may be a quaint anachronism for an industrial society, in rural Alaska it is a daily reality. There, cultural forces and lack of integration into the Western cash economy join together to make subsistence hunting and fishing the prime focus of life.

Subsistence is loosely defined as the harvest of wild resources to provide food and raw materials for personal use, sharing, and distribution to kin, in accordance with established custom and tradition.[6] A cyclical process, it begins when Alaskan Natives harvest fish and game. It continues as they directly consume it, share it, exchange it on local trade networks, or sell it for cash. Cash is then used to buy hunting and fishing equipment, with the process being completed when that equipment is used in further harvesting efforts. Large mammal hunting communities, such as Gambell and Savoonga on St. Lawrence Island, also obtain the cash needed to pursue their subsistence activities through the carving and sale of marine mammal by-products including whale bone, walrus ivory and oosiks, and baleen.[7]

Subsistence activities are indispensable to the economic well-being of the Native inhabitants of western Alaska and the Bering

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[5] *Id.*; N. Chance, THE ESKIMO OF NORTH ALASKA 9 (1966).

[6] *See* R. Little and L. Robbins, EFFECTS OF RENEWABLE RESOURCE HARVEST DISRUPTIONS ON SOCIOECONOMIC AND SOCIOCULTURAL SYSTEMS: ST. LAWRENCE ISLAND, Alaska OCS Socioeconomic Studies Program, Technical Report No. 89 (June 1984) (hereafter LITTLE AND ROBBINS). *See also* 16 U.S.C. § 3113 (defining "subsistence uses" for the purposes of the Conservation Act).

[7] LITTLE AND ROBBINS at 291-92.

Sea region.[8] Rural Native Alaskans have little access to the cash economy. Few can find jobs, for industry does not exist. Cash incomes must come from occasional wages, state or federal transfer payments, or a combined strategy in which one member of the family works while another hunts and fishes.[9]

Although Natives in rural Alaskan communities have limited incomes, living in the Bush is very expensive. The high cost of living is largely attributable to transportation costs. Distances between villages and regional centers are great; roads do not exist; weather conditions range between harsh and impossible. Goods must be transported by airplane or barge over great distances in inclement weather. Both methods are extremely expensive, and barges cannot operate in winter months when ports are frozen shut.

The net result of low incomes and a high cost of living is poverty. Native Alaska constitutes a Third World within the United States. Many Native Alaskans are fluent only in their native tongue, and most live under conditions unknown elsewhere in the United States. The poverty here is broad and deep. In 1978, the per capita income in the Norton Sound region (Wade Hampton) was only 16% of the average United States per capita income.[10] In practice, this poverty translates into a lack of social amenities such as bathrooms, running water, telephones, and standard housing.

Alaskan Natives have traditionally relied upon subsistence hunting and fishing to overcome this lack of economic opportunity. Because Alaskan Natives cannot afford to buy food, they must catch or kill it. Most western Alaskan Natives depend on the subsistence harvest of fish, marine mammals, birds, whales,

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[8] See generally LITTLE AND ROBBINS; A. Fienup-Riordan, NAVARIN BASIN SOCIOCULTURAL SYSTEMS ANALYSIS, Alaska OCS Socioeconomic Studies Program, Technical Report No. 70 (January 1982).

[9] *See, e.g.*, State of Alaska House Research Agency, PERSONAL INCOME IN THE LOWER YUKON-KUSKOKWIM REGION.

[10] U.S. Department of the Interior, FINAL ENVIRONMENTAL IMPACT STATEMENT: PROPOSED OUTER CONTINENTAL SHELF OIL AND GAS LEASE SALE 57, NORTON SOUND (1982) (hereafter FEIS) at Table III.B.4.13.

and other foods found locally, as their ancestors did for as long as the region has been humanly occupied.[11]

The importance of subsistence hunting and fishing to the economic viability of rural Native Alaskan communities can be understood by comparing cash incomes to the value of subsistence harvests. The value of food secured by subsistence hunting and fishing frequently exceeds cash incomes. In 1976, the annual value of a subsistence harvest for a family of four in western Alaska was $13,000. At the same time, the average cash income for the same family was approximately $5,263.[12] As this example indicates, Alaskan Natives could not feed their families should their subsistence activities be significantly disrupted.

In addition to its economic importance, subsistence hunting and fishing is central to the Eskimo's cultural survival.[13] To an Eskimo, language, culture, spiritual beliefs, customs, and respect for others and for oneself are all tied into a holistic worldview centered around the traditional hunting, fishing, and gathering way of life.[14] Hunting and fishing, sharing the harvest with family and fellow villagers, and acting as a harmonious part of the ecosystem are critical life activities.[15] Because subsistence is crucial, moderate or large-scale disruptions of subsistence activities are likely to result in significant adverse changes in the cultural well-being and stability of western Alaskan Native communities.[16]

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[11] FEIS at 47-48.

[12] R. Wolfe, AN ECONOMIC ANALYSIS OF FOOD PRODUCTION IN A WESTERN ALASKA COMMUNITY 23 (August 1977).

[13] FEIS at 48-49.

[14] *Id.*

[15] *Id.*

[16] LITTLE AND ROBBINS at Chapter XV; J. Jorgensen, EFFECTS OF RENEWABLE RESOURCE HARVEST DISRUPTIONS ON SOCIOECONOMIC AND SOCIOCULTURAL SYSTEMS: NORTON SOUND, Alaska OCS Socioeconomic Studies Program, Technical Report No. 90 (January 1984) at 327-354; *Village of Gambell v. Hodel*, 774 F.2d 1414, 1425 (9th Cir. 1985).

Congress has historically recognized the importance of subsistence harvests for Alaskan Natives.[17] This concern has been most recently expressed in Title VIII of the Conservation Act, a statute whose genesis can be traced to the Alaska Statehood Act. Passed in 1959, the Statehood Act provided that the State of Alaska could select up to 102.5 million acres of land — more than one-fourth of the State's 375 million acre land area.[18] Although the Statehood Act expressly provided that it would not affect existing Native claims, the expectations were that many of the State's selections would include traditional Native hunting and fishing grounds and that the State's selection process would *de facto* eliminate Native claims.[19]

Spurred into action by the Statehood Act, Native groups formed the Alaska Federation of Natives (AFN) in 1966. Upon formation, the AFN convinced Secretary of the Interior Stewart Udall to freeze state land selections until such time as the Native land claims were resolved. The freeze was upheld by the Court of Appeals for the Ninth Circuit in *Alaska v. Udall,* 420 F.2d 938 (9th Cir. 1969). It was continued under the Nixon administration by Secretary of the Interior Walter Hickel.[20]

Discovery of the Prudhoe Bay oilfield ultimately precipitated a settlement of Native land claims. When oil was discovered on the North Slope in 1965, the oil companies believed they needed a Trans-Alaska oil pipeline to get the oil to market. Their initial attempts to construct the pipeline were blocked, first by an environmental lawsuit and then by a suit filed by the Alaskan Natives. *Native Village of Allakaket v. Hickel,* Civil No. 705-70 (D. D.C. 1970). In this latter case, the District Court for the District of Columbia ruled that an Alaskan Native Indian Reorganization Act Association held possessory claims to land in the Yukon River Valley based on aboriginal hunting and fishing

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[17] *See* D. Case, ALASKA NATIVES AND AMERICAN LAWS at Ch. 7 (1984).

[18] J. Hanrahan and P. Gruenstein, LOST FRONTIER: THE MARKETING OF ALASKA 94 (1977).

[19] *Id.*

[20] *Id.* at 95.

rights, and that the Secretary of the Interior could not lease or otherwise dispose of that land without the Natives' consent.

A land claims settlement quickly followed this decision. Once the oil companies realized they could not build a pipeline without first settling the issue of Native claims, they lobbied heavily for an Alaskan Native land claims settlement.[21] With the support of the Nixon administration, but in the face of opposition from various environmental organizations, the oil industry and the Alaskan Natives secured the passage of the Alaska Native Claims Settlement Act in 1971.[22]

The heart of the Claims Act was the establishment of thirteen regional corporations and various village corporations. The Act awarded the regional and village corporations three major forms of compensation: a monetary settlement; rights to future payments from oil, gas, and mineral leases; and 40 million acres of unallocated federal lands. 43 U.S.C. § 1603; *Village of Gambell v. Clark,* 746 F.2d 572, 578-79 (9th Cir. 1984).

The *quid pro quo* was that Congress extinguished all Native claims "in Alaska." Sections 4(a), 4(b), and 4(c) of the Claims Act provide:

> (a) All prior conveyances of public land and water areas *in Alaska,* or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.
>
> (b) All aboriginal titles, if any, and claims of aboriginal title *in Alaska* based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.
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> (c) All claims against the United States, the state, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas *in Alaska,* or

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[21] M.C. Berry, THE ALASKA PIPELINE: THE POLITICS OF OIL AND NATIVE CLAIMS 23, 163 (1975).

[22] J. Hanrahan and P. Gruenstein, *supra,* at 95.

> that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

43 U.S.C. §§ 1603(a), (b), and (c) (emphasis added).

The passage of the Claims Act was not expected to end federal protection of Native fishing and hunting rights. The land claims settlement was generous, but it had little relevance to most Alaskan Natives whose daily life revolved around hunting and fishing.[23] Recognizing this fact, Congress instructed the State of Alaska and the Secretary of the Interior to protect the subsistence needs of the Alaskan Native population.[24]

The protections did not materialize. Neither the Secretary nor the State of Alaska moved to protect the subsistence needs of Alaskan Natives. As a consequence, Congress was forced to act. It remedied the Secretary's and the State's misfeasance in 1980. Resurrecting language earlier deleted from drafts of the Claims Settlement Act,[25] it included in Title VIII of the Alaska National Interest Lands Conservation Act procedural and substantive protections for subsistence fishing and hunting.

The Senate Committee Report accompanying the Conservation Act describes why the statutory protections for subsistence hunting and fishing previously dropped from the Claims Settlement Act had to be placed in the Conservation Act. The report provides:

OVERVIEW

> Alaska's more than 200 rural villages are unique in that they are the last communities in the United States

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[23] *Id.* at 109.

[24] H. Conf. Rep. No. 746, 92d Cong., 1st Sess. 37, *reprinted in* 1971 U.S. Code Cong. & Ad. News 2247, 2250.

[25] *Compare* S. 835, 92d Cong., 1st Sess. § 16(b)(1) (1971) *and* H.R. 7039, 92d Cong., 1st Sess. § 16(b)(1) (1971) *with* 16 U.S.C. § 3120.

in which a substantial number of residents are still dependent upon the harvest of renewable resources on the public lands for their sustenance. The importance of subsistence uses of such resources to the physical, economic and cultural well-being of Alaska Natives and other rural residents has been exhaustively chronicled in testimony presented at hearings, town meetings and workshops held by the committee during consideration of both the Alaska Native Claims Settlement Act and the Alaska National Interest Lands Conservation Act. The committee notes that the report of the Committee on Interior and Insular Affairs of the House of Representatives on H.R. 39 (House Report No. 95-1045, Part I, pp. 181-187) documents the importance of such uses in considerable detail.

HISTORY OF CONCERN

The Committee has had a long-standing concern for the protection of subsistence resources and uses in Alaska. In Section 21 of S.35, the Senate version of the Alaska Native Claims Settlement Act, the Secretary was directed to establish subsistence zones on the public lands, and, in circumstances in which subsistence resources or uses were threatened, to exercise his closure authority by prohibiting all consumptive uses of such resources within a zone except for subsistence uses by Alaska Natives. The conferees failed to adopt this provision in the conference report; however, the statement of the managers clearly established the intent of the Congress that the Secretary exercise his closure authority in a manner consistent with the purposes of Section 21.

S. Rep. No. 413, 96th Cong., 2d Sess. 230-31, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, 5174-75.

Title VIII implements this long-standing Congressional concern by providing a systematic and comprehensive scheme for protecting the hunting and fishing rights of Alaskan Natives.

The Act declares that "the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence...." 16 U.S.C. § 3112(1). It states that all leasing and other land use decisions must allow, to the maximum extent possible, "the opportunity for rural residents engaged in a subsistence way of life to do so." *Id.* To achieve these ends, the statute requires federal land managers to carefully evaluate the impact of leasing on subsistence uses and resources, and to identify alternative land selections before making any leasing decisions. 16 U.S.C. § 3120(a). For leasing that might significantly restrict subsistence activities, the land manager, before issuing any leases, must insure that: (1) the restriction is necessary; (2) the leasing involves the minimal amount of public land; and (3) reasonable steps will be taken to minimize adverse impacts on subsistence uses and resources. 16 U.S.C. § 3120(a)(1)-(3).

Congress insured that the protections provided by the Conservation Act would be widely available. The Act applies to all conceivable federal interests, placing "lands, waters, and interests therein" under its umbrage. 16 U.S.C. § 3102(1). The geographic coverage is similarly broad. Mirroring and applying coextensively with the Claims Settlement Act from which it was derived, the Conservation Act protects all federal lands "in Alaska." 16 U.S.C. § 3102(3).

After Congress passed the Conservation Act in 1980, Alaskan Natives expected that Secretary Watt would heed its statutory directives and take the steps necessary to insure that their subsistence uses would not be unreasonably compromised. Their expectations were destined to be disappointed. Rather than addressing the subsistence uses and needs of Alaskan Natives, Secretary Watt proceeded to ignore them. His attitude was illustrated by his reaction to suggestions that OCS leasing might seriously disrupt the subsistence activities of Alaskan Natives. Responding to these concerns, he adamantly insisted that "35,000 people on the edge of the world" would not influence his plans to lease the Alaskan OCS.[26]

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[26] The Wall Street Journal, March 12, 1986, at 64.

In practice, Secretary Watt expressed his refusal to consider the subsistence uses of Alaskan Natives in connection with his OCS leasing program in an inconsistent and unfair application of Title VIII of the Conservation Act and Section 4(b) of the Claims Settlement Act. The inconsistency began in *Inupiat Community of the Arctic Slope v. United States.*[27] There, Inupiat Eskimo asserted aboriginal title to OCS lands which they had traditionally used and occupied. To defeat these aboriginal claims, Secretary Watt and the oil companies took the position that the Claims Settlement Act abolished aboriginal hunting and fishing rights outside the territorial waters of the State of Alaska. Claiming that the term "in Alaska" comprehended the OCS and included all lands lying between the high tide mark and the two hundred mile limit, the Secretary argued that a technical interpretation restricting the term "in Alaska" to anything less than the two hundred mile limit would be "tortured." The oil companies — also parties in that case — alleged that Congress had intended the phrase to be geographically descriptive and that such a use was "a perfectly natural one."

After adopting the position that the Claims Act applied to the OCS, Secretary Watt then proceeded to openly ignore the requirements of Title VIII. His theory was premised on the assumption — remarkable in light of the position taken in *Inupiat Community* — that the Conservation Act could not be interpreted as extending beyond the State's territorial waters. Without holding hearings or otherwise opening the administrative process to any public comment, he concluded that the term "in Alaska" was technically descriptive and did not apply to the OCS.

The tribal villages of Gambell and Stebbins called into question Interior's attempt to create a gap in the protections for the subsistence uses of Alaskan Natives when they filed this case on March 4, 1983. Their claim was simple. The term "in Alaska" had to be construed consistently and fairly. As used in two sister statutes — the Claims Settlement Act and Title VIII of the Conservation Act — the term was either geographically or technically

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[27] 548 F. Supp. 182 (D. Alaska 1982), *aff'd on other grounds,* 746 F.2d 570 (9th Cir. 1984), *cert. denied,* ____ U.S. ____, 106 S. Ct. 68 (1985).

descriptive. If geographically descriptive, Title VIII applied to OCS leasing. If technically descriptive, Alaskan Natives retained their aboriginal hunting and fishing rights beyond the State's territorial waters because such rights had not been extinguished by the Claims Settlement Act.

The suit placed Interior and the oil companies in the impossible position of justifying an illogical and inconsistent application of an identical term in two sister statutes. Their resulting responses lacked grace. Before the tribal villages filed *Gambell I,* the Secretary and the oil companies had vigorously contended in *Inupiat Community* that it was "clear and unambiguous" that the phrase "in Alaska" referred to a geographic area lying between the high tide mark and the two hundred mile limit. After *Gambell I* was filed, they contended that the phrase could not possibly have that meaning, and that it was — of all things — "clear and unambiguous" that the term referred to a limited geographic area lying between the three mile limit and the high tide mark.

On appeal, Secretary Watt and the oil companies found themselves in the awkward position of presenting contradictory reasons why the Claims Act and Title VIII should be construed inconsistently and unfairly. The oil companies argued that the meaning of the term "in Alaska" was clear and unambiguous and that it did not include the OCS. They admitted that neither sections 4(a) nor 4(b) of the Claims Act — the sections which abolished aboriginal title — applied to the OCS. Yet they argued that either paramount federal authority or section 4(c) of the Claims Act, a section which abolished legal claims "based on claims to aboriginal title ... in Alaska," did abolish such title.

Secretary Watt took an entirely different position. He disputed the oil companies' claim that the meaning of the term "in Alaska" was clear and unambiguous on its face. Arguing that the term was opaque and otherwise totally ambiguous, he contended that the construction of both statutes had to be resolved by their legislative history. That history, he further argued, demonstrated that Congress intended for the same term in the two sister statutes to have totally opposite meanings.

The Court of Appeals for the Ninth Circuit understandably rejected these claims. It chose the consistent and fair interpretation

urged by the tribal villages — that the same term in the two historically-linked statutes had the same meaning. Eschewing the alternative of reading the term technically, it held that the term was geographically descriptive, encompassing areas outside as well as inside the territorial waters of the State.[21] Because the court found the phrase to be geographically descriptive, it determined that the Claims Settlement Act extinguished Native hunting and fishing rights outside the three-mile limit as well as that Title VIII of the Conservation Act protected the same rights in the same area. 746 F.2d at 579, 582.

The court of appeals did not, however, void the sale. Rather than take this step — as urged by the tribal villages — it chose to remand the case to the trial court for a legal and factual determination as to the appropriate remedy for the violation of the Conservation Act's prescriptions. The action was requested by the Secretary and the oil companies. To avoid having the lease sale summarily voided, both the Secretary and the oil companies had contended that the tribal villages would be entitled to an injunction should the court hold that the Conservation Act applied to OCS leasing. The Secretary had argued that the proper remedy was to enjoin exploration until such time as he complied with the requirements of the statute. The oil companies had gone farther, claiming that "If this court should hold that § 810 of ANILCA applies to the OCS, the appropriate remedy would be ... to enjoin further activities until the Secretary completes the procedures required by the statute...." 774 F.2d at 1417. In response to these arguments, the appellate court remanded the matter back to the district court for the limited purpose of deciding whether the sale should be voided or whether further activities should be permanently enjoined. 746 F.2d at 582-83.

A preliminary injunction should have issued automatically on remand. The remand order directed the district court to either void Lease Sale 57 or to permanently enjoin further exploration and development until Interior complied with the Conservation Act. Pending that determination, a preliminary injunction

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[21] *See Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984) (*Gambell I*); *Inupiat Community of the Arctic Slope v. United States*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 106 S.Ct. 68 (1985).

preserving the status quo as well as the district court's ability to fashion appropriate final relief would have been an imminently appropriate and necessary interim remedy. *University of Texas v. Camenisch,* 451 U.S. 390, 395 (1981).

The Secretary and the oil companies had different ideas. In spite of their representation to the *Gambell I* court that an injunction was the proper remedy, they reversed their position on remand and argued that an injunction was not an appropriate remedy. They argued that Interior had fully and completely complied with the Conservation Act. The heart of their case was an inadvertent compliance claim. According to this notion, Interior had necessarily complied with all the requirements of the Conservation Act when it complied with the National Environmental Policy Act and the Outer Continental Shelf Leasing Act.

The district court rejected the inadvertent compliance argument but failed to issue the preliminary injunction which the remand order had so clearly contemplated. Expressing a natural skepticism that the Secretary could "inadvertently comply" with the Conservation Act, the district court judged that the Secretary had violated the statute on a number of counts. Chief among the violations were the Secretary's failure to prepare subsistence studies for the two challenged lease sales with the precepts of the Act clearly in mind and his failure to give the notice, hold the hearings, and make the findings required by sections 810(a)(1)-(3) of the Conservation Act. Nevertheless, the district court failed to enter the injunction requested by the tribal villages. Without explaining or elucidating its reasoning or rationale, and without expressly balancing the equities, it summarily concluded that an injunction was not an appropriate remedy in the case.

The court of appeals reversed. Noting that Interior and the oil companies had previously represented to it that an injunction was the appropriate remedy, it proceeded to balance the equities. It found that the balance tipped decidedly in favor of the tribal villages. Moreover, it found that the public interest, as expressed in the Conservation Act, favored granting the injunction. On the basis of these traditional equitable principles, it ordered the

district court to enter an injunction and once again remanded the case for a determination as to whether the lease sales should be voided.

The Secretary and the oil companies have now petitioned this Court for a writ of certiorari reviewing this decision as well as the decision in *Gambell I*. The petitions seek review of the conclusion, reached in *Gambell I*, that Title VIII applies outside the territorial waters of the State of Alaska. They further seek review of the *Gambell II* decision. Here the issues relate to the appropriateness of the lower court's balancing of the equities, the correctness of its construction of the Conservation Act, and its application of the Act to a lease sale which occurred after *Gambell I* was filed and submitted for decision but before the court's resulting opinion was published.

REASONS FOR NOT GRANTING THE WRIT

I

THIS CASE IS A TEMPEST IN A TEACUP

The Secretary and the oil companies strongly suggest that this case presents important practical and legal issues. They allege that this case may seriously disrupt the nation's quest for energy independence and that, at the least, it involves leases whose value approaches four billion dollars. Further alleging that this mischief is created by the Conservation Act, the Secretary and the oil companies also suggest that any issues associated with that Act, no matter how trivial in the abstract, must likewise be so important as to warrant review by this Court.

These claims grossly exaggerate both the practical and legal implications of the case, creating a virtual tempest in a teacup. The supposed legal importance of the case is difficult to ascertain. The legal issues presented for decision are mundane and highly idiosyncratic. Possessing little relevance outside the narrow parameters actually presented for review, the legal issues cannot credibly produce the draconian consequences to which the petitioners allude. Nor does the case possess any practical importance. Exploration has proven that the actual lease tracts at issue contain no oil. For future leases, the substantive decision in the case merely requires Interior to comply with a fairly short and straightforward statute. That compliance effort does not pose a realistic threat to the nation's energy program or to its economic health.

This case certainly is of little immediate consequence, for the leased tracts at issue here hold out no promise of ever producing commercial quantities of oil and gas. Through adroit and facile legal maneuvering, the oil companies have completed exploratory drilling on the most promising of their tracts. That exploration has resulted in dry hole after dry hole — ample and convincing proof that the tracts likely contain no commercial quantities of oil and gas. Indeed, one irony of this case is that, in retrospect, the oil companies and the nation's economy would have undoubtedly been best served if the district court

had enjoined the lease sales. This would have at least prevented the oil companies from squandering resources exploring for oil on tracts where the probability of finding oil asymptotically approaches zero. A second irony is that, having obtained the information needed to reach that conclusion, the oil companies have every incentive to reverse their position one last time and claim that the sales should be voided — a remedy that would permit them to recover their misspent bid money.

This case similarly possesses little importance for future lease sales. The lower court held that Interior had to comply with a simple and short statute requiring that OCS leasing not unreasonably interfere with the subsistence fishing and hunting rights of Alaska's aboriginal people. This compliance effort will concededly change the contours of some OCS lease sales, for it requires the deletion of tracts which are important for subsistence but which hold a low potential for oil and gas. It will concededly delay OCS leasing in Alaska by requiring that Interior identify subsistence uses and needs before leasing occurs. In some extreme cases, it may prohibit unnecessary lease sales.

But these consequences are relatively insignificant. Leasing in a manner that minimizes the conflict between subsistence uses and oil and gas development is a sound idea. The Secretary should adopt it regardless of the existence of the Conservation Act. Moreover, delays attributable to adopting such a plan are of no great moment. The economic health of the country does not demand an expedited development of the Alaskan OCS. The cost of producing a barrel of oil in the Alaskan OCS ranges upwards of $40. The oil companies need approximately fifteen to twenty years to develop producing oil wells in that inhospitable and environmentally sensitive area. Current oil prices are hovering at $10-$15 per barrel; production of Alaskan OCS crude lies fifteen years in the future. The economic incentives for developing the Alaskan OCS are currently so low that within the last year Interior has twice canceled scheduled sales for lack of industry interest.[29] In this economic climate, expeditiously leasing the Alaskan OCS is certainly not a pressing national need.

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[29] The Anchorage Daily News, April 29, 1986 at B6.

Interior should encounter few problems when complying with the statute. The Conservation Act has applied to federal oil leases since 1980. Since that date, Interior has recognized that it controls disposal of the vast federal land holdings located on the Alaskan mainland. The agency has applied the statute to countless land disposals and offered countless leases for sale during this period. Not one disposal or lease has been prevented by the Conservation Act. Interestingly enough, the only Conservation Act challenge to a mainland lease sale was rejected by the same lower court which the Secretary would have this Court believe is unreasonably prejudiced against him. *Kunaknana v. Clark,* 742 F.2d 1145 (9th Cir. 1984).

Interior would best serve the public interest as well as all private interests by ending its pointless and unproductive judicial wrangling and by implementing a compliance program. Interior has proven that it can comply with the Conservation Act when it wishes. Yet it has chosen to take the low road in this case by refusing to comply with an inherently reasonable statute setting forth a sound management plan for the use of Alaska's natural resources. Its course has been folly. After three years of expensive and time-consuming litigation, no one is better off. The Secretary's OCS program in Alaska has been disrupted. The oil companies have been subjected to unnecessary delays and uncertainty. Alaskan Natives' subsistence needs have been virtually ignored. The better alternative is clear. The Secretary can promote all relevant interests by complying with the Conservation Act. Interior possesses the power to expeditiously lease the Alaskan OCS. It need only drop its recalcitrance and resolve to fairly and conscientiously address the subsistence needs of Alaskan Natives.

II

THE PETITIONS ARE UNTIMELY TO THE EXTENT THEY SEEK REVIEW OF THE DECISION THAT THE CONSERVATION ACT APPLIES TO OCS LEASING

The Secretary and the oil companies have requested review of *Gambell I's* determination that Title VIII of the Conservation Act applies to the OCS. In addition to raising an unimportant issue that has been settled for virtually two years, the petitions on this issue are untimely.

The rules governing timeliness are straightforward. Rule 20 provides that a petition for a writ of certiorari to review the judgment of a federal court of appeals shall be deemed in time "when it is filed with the Clerk within 60 days after the entry of such judgment." Sup. Ct. R. 20.1. That Rule further provides that "the time for filing a petition for a writ of certiorari runs from the date the judgment or decree to be reviewed is rendered, and not from the date of the issuance of the mandate." Sup. Ct. R. 20.4.

The judgment concerning the geographic scope of the Conservation Act was rendered on November 2, 1984. As noted by the petitioners, the court of appeals in *Gambell I* determined that Title VIII of the Conservation Act applied to the OCS on that date. This issue was not subsequently presented to the *Gambell II* court, and that court understandably did not pass on it.

The petitions on the issue of the geographic scope of the Conservation Act are therefore late. The only lower court judgment or decree dealing with whether the Conservation Act applies to the OCS was rendered on November 2, 1984. The time for seeking a writ of certiorari reviewing that decree ran on January 31, 1985. The decree cannot be reviewed by a petition filed in February of 1986.

This conclusion is supported by none other than the Solicitor General himself. After *Gambell I* was decided, the Solicitor requested of this Court an extension of time in which to file a petition for certiorari reviewing the judgment that Title VIII of the Conservation Act applied to the OCS. That request, reproduced below, concedes that the time for reviewing the *Gambell I* decision ran on March 2, 1985. It states:

The Solicitor General, on behalf of the Secretary of the Interior and the Department of the Interior, respectfully requests an extension of time, to and including March 2, 1985, within which to file a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this case. The judgment of the court of appeals was entered on November 2, 1984. A copy of the court's opinion is attached hereto. Unless extended, the time for filing a petition for a writ of certiorari will expire on January 31, 1985. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3120, establishes procedural requirements to be followed by federal land managers in order to harvest fish and wildlife. These requirements apply only to "land situated in Alaska," "title to which is in the United States" (16 U.S.C. 3102 and 3120). The question presented by this case is whether the seabed and subsoil of the Outer Continental Shelf fall within this definitional limitation, in light of the fact that the Outer Continental Shelf is outside the boundaries of the State of Alaska and the United States claims only sovereign rights to explore and exploit the resources of the Outer Continental Shelf but not ownership. The court of appeals held, inter alia, that ANILCA's procedural protections for subsistence activities do apply to Outer Continental Shelf lands and water contiguous to the State of Alaska. The decision of the court of appeals may be read to create a conflict between ANILCA and the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* The decision may also inject new legal requirements and procedures into existing statutory schemes for managing ocean resources in a manner not intended by Congress.

Application for an Extension of Time Within Which to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, January 18, 1985.

This Court granted the Solicitor's request for an extension of time in which to seek review of the decision that the Conserva-

tion Act applies to OCS leasing. Electing not to seek review of the decision, the Solicitor permitted the deadline for the certiorari petition to pass. Interior then acquiesced in the decision by conceding that it was the correct rule of law on remand. Following *Gambell I*, the Secretary did not controvert the judgment that the Conservation Act applied to OCS leasing, either in the district court or the court of appeals. The oil companies similarly did not argue that *Gambell I* was wrongfully decided in either court.[30]

The Secretary's and the oil companies' failure to relitigate whether the Conservation Act applies to OCS leasing precludes their now petitioning for a writ of certiorari on that issue. Central to the relationship between higher and lower courts is the precept that, with limited exceptions, a higher court will not review an issue not presented to the inferior tribunal by the losing party.[31] The precept applies in this Court. An unbroken string of decisions previously issued by this Court holds that "[w]hen the issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 146 n.2 (1970). *Accord, e.g., Youngberg v. Romero*, 457 U.S. 307, 316 n.19 (1982); *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958); *Husty v. United States*, 282 U.S. 694 (1931); *Duignan v. United States*, 274 U.S. 195 (1927).

The corollary to this rule is that a party losing an appeal must preserve the issue on remand in order to later petition for certiorari. The mechanics of the process are straightforward.

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[30] The oil companies' brief to the *Gambell II* court did indicate, by means of a one sentence footnote, that they "reserved" the argument that the Conservation Act did not apply to the OCS. An otiose reference at best, the footnote constitutes not the affirmative presentation of the issue contemplated by the Federal Rules. *E.g., Chicago & Western Indiana R.R. Co. v. Motorship Buko Maru*, 505 F.2d 579, 581 (7th Cir. 1974).

[31] The relationship dictates that the higher court will, however, affirm on any grounds, including those not relied upon or even considered by the lower court. *E.g., Hankerson v. North Carolina*, 432 U.S. 233, 240 n.6 (1977); *Massachusetts Mutual Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480-81 (1976); *Dandridge v. Williams*, 397 U.S. 471, 475-76 n.6 (1970); *Langnes v. Green*, 282 U.S. 531, 535-39 (1931).

Following the remand, the issue must be re-presented to the trial court and, where an appeal is possible, re-presented to the appellate court. Only after perfecting the appeal in this manner may the party petition for certiorari. The two cases cited by the Solicitor — *Reece v. Georgia,* 350 U.S. 85 (1955) and *Falk v. Brennan,* 414 U.S. 190 (1973) — establish precisely this point. Those decisions hold that petitioning parties must preserve their rights after the remand by relitigating the lost issue in the trial court and, when appropriate, in the court of appeals. *See also Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481, 488 n.6 (1968); *Toledo Scale Co. v. Computing Scale Co.,* 261 U.S. 399, 418 (1923); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 257-58 (1916).

The petitions with respect to whether the Conservation Act applies to the OCS are untimely. *Gambell I,* decided more than two years ago, held that the Act applied to the OCS. The time for petitioning for a writ of certiorari reviewing that decision ran over a year ago. Neither the Secretary nor the oil companies relitigated that issue in either the district court on remand or in the court of appeals in *Gambell II.* Having failed to present the issue to the *Gambell II* court, they cannot request that this Court review an issue decided two years ago and not preserved after the remand.

III

THE PETITIONERS CANNOT COMPLAIN ABOUT AN INJUNCTION WHICH ISSUED AT THEIR REQUEST

The Secretary and the oil companies have also petitioned for a writ of certiorari reviewing the court of appeals' determination that exploratory and developmental activities on tracts leased in violation of the Conservation Act should be enjoined. Review of this issue should be denied because the lower court issued the injunction at the Secretary's and the oil companies' behest.

The facts establish that the petitioners requested the injunction ordered by the *Gambell II* court. During the appeal of *Gambell I*, the tribal villages requested that the court of appeals void the Norton Sound lease sale. They contended that the Secretary had failed to comply with the statutory prescription of the Conservation Act before the sale and that, in light of the pertinent statutory language, he could not comply afterwards. The Secretary and the oil companies vigorously disagreed. To protect the lease sale, they requested that the court enjoin exploration and development rather than void the sale if it concluded that the Conservation Act applied to OCS leasing. 774 F.2d at 1417.

The *Gambell I* court declined to rule on this issue. Expressing the opinion that the issue involved significant legal as well as factual issues, it remanded the case to the district court for a decision as to whether the sale should be voided or whether exploratory and developmental activity should be enjoined. The remand order clearly circumscribed the district court's available choices. Under the order, the district court could either: (1) void the sale; or (2) enjoin all exploration and development until such time as the Secretary complied with the statute. *See* 746 F.2d at 582-83.

The *Gambell II* court relied heavily on this aspect of *Gambell I* when it reversed the district court's denial of a preliminary injunction. Quoting extensively from both the Secretary's and the oil companies' briefs in *Gambell I*, the *Gambell II* court judged that the Secretary and the oil companies had previously requested the injunction. 774 F.2d at 1417. It further judged that they could not abandon that position following the *Gambell I*

remand order merely because it was in their interest to do so. On this basis, the lower court determined that a preliminary injunction should issue until the district court either permanently enjoined exploration and development or voided the sale.

The record indicates that the lower court's decision to enjoin exploratory and developmental activity was dictated by the litigation position adopted by the Secretary and the oil companies. To a large extent the petitions submitted by the Secretary and the oil companies present a false portrait of the issue put to the *Gambell II* court. Implicit in their petitions is the suggestion that the court of appeals had placed before it a choice of enjoining exploration and development or not enjoining these activities. This is inaccurate. The choice presented to the lower court was between voiding the sales or enjoining exploration and development. The tribal villages asserted that the statutory language of the Conservation Act demanded that the court void the challenged sales. The Secretary and the oil companies argued that enjoining exploration and development was the appropriate remedy.

Because the Secretary and the oil companies requested that the court of appeals issue a permanent injunction, they have no ground for petitioning for review of its decision to issue a preliminary one. The Secretary and the oil companies requested that the court of appeals permanently enjoin exploration and development rather than void the sale. Pursuant to their request, that court ordered the district court to seriously consider whether they were entitled to have exploratory and developmental activities enjoined or whether the sale should be summarily voided. Having persuaded the lower court to at least consider their request for a permanent injunction enjoining exploration and development, the Secretary and the oil companies can hardly be heard to complain that the court entered a preliminary injunction enabling them to make their case on why the sale should not be voided. Surely the court of appeals is entitled to more gratitude than this.

IV

THE COURT OF APPEALS DID NOT APPLY A PER SE INJUNCTION RULE

The Secretary and the oil companies' petitions for a writ of certiorari reviewing the court of appeals' application of a *per se* injunction rule should be denied for an additional reason: namely, that the court of appeals did not apply such a rule.

The lower court's opinion details the standards the court applied when it evaluated the tribal villages' claim for preliminary injunctive relief. Contrary to the Secretary's and the oil companies' assertions, it irrefragably provides that the lower court used a traditional test which considered the probability of success on the merits, the balance of the equities, and the public interest. The opinion states:

> *A. Applicability of the Traditional Test*
>
> This court has recognized two sets of standards for evaluating a claim for injunctive relief. We refer to one as the "traditional" test and the other as the "alternative" test. *American Motorcyclist Ass'n v. Watt,* 714 F.2d 962, 965 (9th Cir. 1983). In *American Motorcyclist Ass'n* we described the traditional test as follows: "The traditional equitable criteria for determining whether an injunction should issue are (1) Have the movants established a strong likelihood of success on the merits; (2) does the balance of irreparable harm favor the movants; (3) does the public interest favor granting the injunction?" *Id.* at 965.
>
> "The 'alternative' test permits the moving party to meet its burden by demonstrating either a combination of probable success and the possibility of irreparable injury or that serious question are raised and the balance of hardships tips sharply in its favor." *Id. (citing Benda v. Grand Lodge of IAM,* 584 F.2d 308, 314-15 (9th Cir. 1978), *cert. dismissed,* 441 U.S. 937 (1979); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,* 526 F.2d 86, 88 (9th Cir. 1975)).

> We have concluded, however, that the traditional and the alternative tests are "not really two entirely separate tests, but that they are merely extremes of a single continuum." *Benda v. Grand Lodge of IAM,* 584 F.2d at 315. *Accord, Regents of University of California v. ABC,* 747 F.2d 511, 515 (9th Cir. 1984); *Los Angeles Memorial Coliseum Comm'n v. National Football League,* 634 F.2d 1197, 1200 (9th Cir. 1980). We have also noted that "[t]he difference between the two formulations is insignificant. Therefore, we accept either as satisfactory." *Benda,* 584 F.2d at 315. Because the district court employed only the traditional test, we will review the findings under that formulation. *See Regents of University of California v. ABC,* 747 F.2d at 515-16 n.4 (where the district court made a finding that the public interest favored the issuance of the preliminary injunction, this court reviewed the district court's findings under the traditional standard).

774 F.2d 1414, 1419 (9th Cir. 1985).

The decision to issue the injunction flowed naturally from the application of this traditional test. The court of appeals first determined, presumably to no one's surprise, that Interior had failed to comply with a statute that it had consciously refused to apply to OCS leasing. It then proceeded to the balance of equities. Here it found that the Secretary's violations of the Conservation Act constituted irreparable harm. *See id.* at 1422-1425. It also found that the "by-products of oil and gas exploration such as potential oil spills, leakage, and noise" threatened to disrupt subsistence hunting and fishing to the extent that it could "destroy irreparably the isolated and unique culture of the Native Alaskans." *Id.* at 1426. Since neither Interior nor the oil companies offered any evidence indicating that they would suffer irreparable harm if the injunction issued, the court concluded that the balance of the equities tipped sharply in favor of the tribal villages. The court then ended its inquiry by considering the public interest. On this issue, the court judged that the best expression of the public interest was contained in the Congressional prohibition against leasing in a manner that unreasonably restricted subsistence uses. It further judged that

the public interest would be best served by requiring that the Secretary follow the controlling statutory requirements. *See id.* at 1425-26.

This decision simply does not support a petition to review an ostensible application of a *per se* injunction rule. The only aspect of the opinion which might conceivably be *per se* is the conclusion that violations of statutory prohibitions are judicially cognizable harms which must be considered in determining whether injunctive relief is appropriate in a given case. This long-standing presumption is the governing rule in this Court as well as in every circuit court of appeals. *E.g., Weinberger v. Romero-Barcelo,* 456 U.S. 305, 315 (1982); *TVA v. Hill,* 437 U.S. 153, 193-96 (1978); *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 417 (1975); *United States v. City and County of San Francisco,* 310 U.S. 16, 30-31 (1940); *Foundation On Economic Trends v. Heckler,* 756 F.2d 143, 157 (D.C. Cir. 1985); *Alaska v. Andrus,* 580 F.2d 465, 485 (D.C. Cir.), *vacated in part as moot sub nom. Western Oil and Gas Association v. Alaska,* 439 U.S. 922 (1978); *Massachusetts v. Watt,* 716 F.2d 946, 952-53 (1st Cir. 1983); *Sierra Club v. United States Army Corps of Engineers,* 701 F.2d 1011, 1034-35 (2d Cir. 1983); *Citizen Advocates for Responsible Expansion v. Dole,* 770 F.2d 423, 443 (5th Cir. 1985); *United States v. City of Painesville,* 644 F.2d 1186, 1193-94 (6th Cir. 1981); *Wisconsin v. Weinberger,* 745 F.2d 412, 425-28 (7th Cir. 1984). *See* Plater, *Statutory Violations and Equitable Discretion,* 70 Cal.L.Rev. 524 (1982). It cannot realistically be viewed as presenting a substantial issue needing reaffirmation on yet one more occasion.

The petitioners' real quarrel is with their failure to make a record demonstrating they would suffer irreparable harm if the injunction issued. Their complete and absolute inability to construct such a record is remarkable. Certainly the Secretary never claimed he would suffer any harm. In both the district court and the court of appeals he stood silent, tacitly conceding that the government would not suffer any harm should the injunction issue. 774 F.2d at 1424-25. Nor did the oil companies do much more. For their part, they argued that they would be harmed by financial losses that would accrue from disrupted contracts signed after *Gambell I* was decided. Properly ignoring this harm,

the court of appeals applied the invariant rule that a party cannot alter the balance of hardships by bootstrapping itself into a position of harm.

In summary, the record in this case does not reveal that the lower court applied a *per se* injunction rule. Precise and explicit, it unquestionably demonstrates that the injunction issued because the petitioners failed to show any irreparable harm associated with the issuance of an injunction. The lower court's decision to issue the injunction was not — as the Secretary and the oil companies claim — a function of the application of a *per se* rule. It was merely the normal and expected result which obtains from balancing the equities when one side puts nothing on the scales for the weighing.

V

THE LOWER COURT'S DECISION THAT THE CONSERVATION ACT APPLIES AT THE LEASING STAGE DOES NOT PRESENT A SERIOUS LEGAL QUESTION

Both the Secretary and the oil companies have requested that this court review the Ninth Circuit's decision holding that the Conservation Act applies at the leasing stage. Relying on *Secretary of the Interior v. California,* 464 U.S. 312 (1984), they allege that the Conservation Act should be construed to apply only to exploration and development. Pushing the analogy between different statutes beyond all reason, they further allege that the lower court's decision in this case conflicts with this Court's decision in that one.

The argument that this case conflicts with *Secretary of the Interior v. California* is specious. The issues presented by the two cases are not remotely similar. *Secretary of the Interior* resolved the timing question of when the Coastal Zone Management Act applied to OCS leasing. That statute requires a consistency determination whenever an administrative action "directly affects" the coastal zone. This Court held that the phrase "directly affects" contemplates an action which results in an immediate and actual physical effect on the coastal zone. Since leasing does not technically effect such an impact, this Court found that the requirements of the CZMA were not triggered by activities associated with that leasing. This case presents no similar timing question. Section 810 of the Conservation Act dictates that compliance must precede leasing. Its terms mandate that the Secretary perform certain studies, initiate certain procedures, and make certain findings. Its terms further mandate that these actions must occur before he decides to lease or before he issues leases. Resolved by the plain language of the statute, the timing question of when the Conservation Act applies to OCS is simply not an issue.

In this regard, the conclusion that the Conservation Act applies at the leasing stage cannot be credibly controverted. The plain language of the statute provides that in the time/space

continuum in which leasing occurs, compliance with the statutory mandates of the Conservation Act must be accomplished before leasing decisions are made, or, in the most extreme case, before any lease issues. It requires the Secretary to complete and then consider extensive studies "*[i]n determining to lease* public lands under any provision of law authorizing such actions." 16 U.S.C. § 3120 (emphasis added). Flatly prohibiting some types of leasing, it further provides that "*[n]o lease* of such lands which would significantly restrict subsistence uses shall be effected" unless and until the Secretary undertakes the procedures and makes the findings specified by section 810(a)(1)-(3). *Id.*

The statutory language resolves all questions relating to the timing of a Conservation Act compliance effort. Embodying specific and direct commands, the statute requires that effort before leasing occurs. And, as the courts of appeals have unanimously held, a compliance effort at the leasing stage must consider the effects attributable to leasing as well as all other actions flowing naturally from that leasing. *See, e.g., North Slope Borough v. Andrus,* 642 F.2d 589 (D.C. Cir. 1980); *Massachusetts v. Watt,* 716 F.2d 946 (1st Cir. 1983); *Conservation Law Foundation v. Andrus,* 623 F.2d 712 (1st Cir. 1979); *Massachusetts v. Andrus,* 594 F.2d 872 (1st Cir. 1979); *County of Suffolk v. Secretary of the Interior,* 562 F.2d 1368 (2d Cir. 1977), *cert. denied,* 434 U.S. 1064 (1978); *Sierra Club v. Morton,* 510 F.2d 813 (5th Cir. 1975); *Village of False Pass v. Clark,* 733 F.2d 605 (9th Cir. 1984).

From a broader perspective, the question presented by this case is whether any compliance effort is required at the lease stage. It is not whether a specified compliance effort is sufficient to meet stringent statutory requirements unreasonably established by the court of appeals. In their petitions, the Secretary and the oil companies suggest that Interior made at least a feeble attempt to comply with the Conservation Act before holding the lease sales at issue. This suggestion is false. Prior to these sales, the Secretary consciously refused to comply with the Conservation Act. After concluding that the Act did not apply to OCS leasing, he ignored its statutory directives. In light of the statutory language which states that compliance must occur

"*[i]n determining to lease,*" Interior's claim that it did not have to comply with the Act before issuing leases hardly presents a dignified and legitimate legal issue — much less one important enough to warrant the attention of this Court.

VI

THIS CASE DOES NOT INVOLVE A RETROACTIVE APPLICATION OF THE CONSERVATION ACT

Finally, the Secretary as well as the oil companies have petitioned this Court for review of what they claim is a retroactive application of the Conservation Act to sales which were held after Congress enacted that statute but before the court of appeals decided *Gambell I*. They allege the decision to apply the Conservation Act to those sales would violate this Court's opinion in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

The record unequivocally demonstrates that this question is not presented by this case. The operative, controlling, and uncontroverted facts are set out by the lower court's opinion. They are as follows. Congress passed the Conservation Act in December of 1980. *Gambell I* was filed on March 4, 1983, about two years later. It was submitted to the court of appeals following oral argument on October 7, 1983. While the case was submitted, the Secretary determined to hold another lease sale. He did so "with knowledge that his right to do so without complying with the Conservation Act was in doubt." 774 F.2d at 1427. The oil companies that were parties to *Gambell I* bid on the leases offered at this sale. They placed their bids "with full knowledge of the risks involved in expending money at a time when the validity of leases sold without compliance with the Conservation Act was pending." *Id.*

These facts do not support the claim that the lower court applied a novel interpretation of the Conservation Act to lease sales held before the Secretary had notice that his interpretation of the Conservation Act would be challenged. This case involves only two lease sales. One was subjected to a Conservation Act challenge before it was held. The other was held after *Gambell I* was submitted — at a time when both the Secretary and the oil companies had constructive as well as actual notice of the potential problems associated with holding an OCS lease sale in Alaska without complying with that Act. Since the two sales at issue here were held after all parties had notice of the Conservation Act challenge, this case does not involve the issue of whether the

Conservation Act should be applied retroactively.[32] Rather than embodying a retroactive application of a new and unexpected statutory interpretation, the lower court's decision merely illustrates the established rule that a litigated case acts as a *lis pendens,* placing on notice all bidders at sales held subsequent to its filing. *E.g., Conservation Law Foundation v. Andrus,* 623 F.2d 712, 720 (1st Cir. 1979); *North Slope Borough v. Andrus,* 486 F. Supp. 326, 331 (D. D.C. 1979).

CONCLUSION

The petitions for certiorari should not be honored. This case has little practical importance in the current economic climate. The legal issues upon which review has been requested are untimely, unimportant, and not presented by the record and facts of this case.

Respectfully submitted,

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April 1986

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[32] No case has raised a Conservation Act challenge to an OCS sale held before *Gambell I* was filed.

Supreme Court, U.S.
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CLERK

No. 85-1406

In the Supreme Court of the United States

OCTOBER TERM, 1985

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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REPLY MEMORANDUM FOR THE UNITED STATES

In our petition, we demonstrated that the court of appeals' rule requiring, save in rare cases, the issuance of an injunction upon the showing of a likely violation of an environmental statute, is contrary to *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), as well as decisions from other circuits. We also showed that the court's extension of Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3120, to the waters above the outer continental shelf (OCS) contravened congressional intent and threatened seriously to disrupt leasing and development of the OCS offshore Alaska. We also explained that, even if Section 810 applies to the OCS, the court's refusal to allow leasing and exploration to proceed until the Secretary complied with Section 810's procedural requirements for *all* stages of the OCS program, including development and production, conflicts with *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984). Finally, we showed that the court er-

roneously applied its construction of Section 810 retroactively, enjoining a lease sale that occurred, without litigation challenge, six months before the court first announced its reading of Section 810.

As we shall now explain, respondents have not offered any persuasive reason why these issues do not warrant this Court's review.

1. Respondents argue (Br. in Opp. 18-22) that the Secretary cannot contest the validity of an injunction that the lower court issued "at the Secretary's * * * behest," and that, in all events, the court of appeals' decision to issue an injunction was based on traditional criteria and not a per se injunction rule. Respondents mischaracterize both the Secretary's position and the court of appeals' ruling.

First, the Secretary never "requested" an injunction. Exploratory drilling in the Sale 57 area began in the summer of 1984, before *Gambell I* was decided (Pet. 4-5). Respondents never challenged the Secretary's approval of the exploration plans (pursuant to 43 U.S.C. 1349(c)), nor did they ask the court of appeals to enjoin that drilling pending appeal. The issues before the court in *Gambell I* related only to the lease sale itself. It was in that context that the Secretary contended that, even if a violation of Section 810 had occurred, "there is no need to undo what has already been done[] [t]he proper role for the court is simply to maintain the status quo while the Secretary does whatever is necessary to comply' " (Pet. App. 3a). Accordingly, the Secretary was not "requesting" an injunction, but merely arguing against rescission of the sale. The "status quo" at the time, moreover, included exploratory drilling and, consequently, maintaining the status quo would not have called for enjoining such drilling. And, of course, even if an injunction had been "requested" in *Gambell I*, any such request would have no bearing on Lease Sale 83, which was not challenged until after *Gambell I*. The scope of the court of appeals' injunction, however, is not limited to Sale 57.

Second, the court of appeals' decision in *Gambell II*, directing the district court to enjoin all activities in connection with both Sale 57 and Sale 83, does not, in any event, purport to rest on any "request" by the Secretary,[1] but relies instead on application of the court's own criteria for evaluating a claim for injunctive relief. Respondents' effort to rewrite the court of appeals' analysis —to suggest that the lower court simply applied traditional equitable criteria—is unavailing. Contrary to respondents' contentions, the court's ruling neither flowed from the failure of petitioners "to show any irreparable harm" (Br. in Opp. 22) nor considered the likelihood of a statutory violation as a mere factor to be taken into account "in determining whether injunctive relief is appropriate in a given case" (*id.* at 21).

As the district court found (Pet. App. 43a), the Secretary made ample showing that injunctive relief would cause "irreparable harm" to a national program of great importance to Congress: "this nation's quest for new oil resources and energy independence" (*ibid.*). Respondents' contention (Br. in Opp. 21) that the Secretary "stood silent" and "never claimed he would suffer any harm" misstates the record. The Secretary identified two types of irreparable harm that an injunction would cause: (1) irreparable harm to efforts under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. (& Supp. II) 1331 *et seq.*, to assess expeditiously the extent of oil and gas resources offshore Alaska; and (2) irreparable harm to efforts to gather geological information necessary for planning the next lease sale in Norton Sound. See Fed. Defs. Opp. to Plaintiffs' Mot. for Preliminary Injunction, Fed. Appellees Br. 44-47, *Gambell II*.

The court of appeals' refusal to give weight to these legitimate and weighty concerns stemmed from its appli-

[1] The court of appeals refers to the Secretary's brief only in its recitation of the facts (Pet. App. 3a). The court nowhere mentions the brief in its analysis of the legal question whether injunctive relief is appropriate (see *id.* at 6a-21a).

cation of a test for injunctive relief which is contrary to this Court's decision in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). In the court of appeals' view, a likely violation of an environmental statute is not merely another factor that "must be considered" (Br. in Opp. 21), but rather creates a presumption that an injunction must issue (see Pet. 10; Pet. App. 15a). Hence, the court of appeals faulted the district court for denying injunctive relief because, having found that there was a strong likelihood that the Secretary had violated Section 810, the district court had a "duty to issue an injunction" (Pet. App. 15a). The court of appeals stressed that only in "unusual circumstances" could this duty be "excuse[d]," citing as examples "irreparable harm *to the environment*" or "interfer[ence] with a long-term contractual relationship" (*id.* at 15a, 16a, 17a (emphasis in original)). Thus, contrary to respondents' characterization (Br. in Opp. 21), the court of appeals' opinion belies any suggestion that the court engaged in a balancing of the equities, as required by traditional standards for injunctive relief. Rather, "the law in th[e Ninth C]ircuit" permits a weighing of the equities in the face of a statutory violation only when certain "unusual" or "rare" circumstances are present (Pet. App. 15a).[2]

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[2] In a belated effort to deny the court of appeals' express rationale, respondents (Br. in Opp. 20) and the State of California as amicus curiae (Br. 4) seize upon the court's isolated statement (Pet. App. 21a) that "[t]he by-products of oil and gas exploration such as potential oil spills, leakage, and noise pose the threat of disruption to subsistence economy sufficient to destroy irreparably the isolated and unique culture of the Native Alaskans." The court of appeals, however, clearly did not base its ruling on any such unsupported factual finding. As we pointed out in our petition (Pet. 16), the Secretary made explicit findings, never challenged by respondents, that exploration would not significantly restrict subsistence resources in the two sale areas. Indeed, as the court of appeals recognized (Pet. App. 15a), the district court's decision not to issue an injunction was based, in part, on its finding "[t]hat exploration will not significantly restrict subsistence resources" (*ibid.*). The court of appeals did not overturn this finding as clearly erroneous (the record certainly would not have supported such action), but

Indeed, a more recent Ninth Circuit decision eliminates any possible remaining doubt concerning the operation of the court's per se injunction rule. In *Tribal Village of Akutan* v. *Hodel*, No. 86-3512 (Apr. 28, 1986) (reprinted in App., *infra*, 1a-7a), involving Lease Sale 92 offshore Alaska, the court of appeals affirmed the district court's conclusion that "an injunction was required as a matter of course under *Gambell II*" once complaining parties "had established a strong likelihood of success on their ANILCA claim" (App., *infra*, 3a). The court of appeals made entirely clear that the Secretary's unchallenged findings in that case that subsistence restrictions were "unlikely" was of no relevance to the question whether an injunction should issue (*id.* at 3a, 7a): "Absent unusual circumstances, irreparable damage is presumed and an injunction is required when an agency violates ANILCA section 810(a)" (*id.* at 4a (citing *Gambell II*)).

2. Respondents make no attempt to refute our showing (Pet. 22-25) that the "public lands" subject to Section 810 do not include the OCS.[3] Respondents argue

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instead ruled that the lack of harm did not qualify as an "unusual circumstance" excusing the mandatory issuance of an injunction (*ibid.*). California also errs in contending (Am. Br. 7) that the court of appeals' ruling could alternatively be justified under the District of Columbia Circuit's "'opportunity to choose'" rule for injunctions. Applying that rule (Pet. App. 43a (citation omitted)), the district court properly *denied* respondents injunctive relief, and the court of appeals flatly rejected that rule in favor of its own standard (Pet. App. 17a).

[3] Nor are respondents correct in claiming (Br. in Opp. 9-10) that the United States has taken inconsistent positions on this point in *Gambell* and *Inupiat*. The United States did *not* rely in *Inupiat* on the argument that the phrase in Alaska "clear[ly] and unambiguous[ly]" mandated application of ANCSA to the OCS. Instead, we relied, inter alia, on the language of Section 4(b) of Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1603(b), which expressly extinguished claims to "submerged land underneath all water areas, both inland and offshore." See Fed. Def. Reply Mem. in Support of Motion for Judgment on the Pleadings 22-23; see also Br. in Opp. at 34 & n.22, *Inupiat Community* v. *United States*, 746 F.2d 570 (9th Cir. 1984), cert. denied, No. 84-1301 (Oct. 7, 1985).

(Br. in Opp. 12-15) instead that certiorari should be denied because the case is unimportant. That characterization is not easily reconciled with respondents' own repeated emphasis of the crucial importance of the natural resource at stake (*id.* at 2, 3, 4, 5) and, more importantly, their specific admission that the effect of the court of appeals' ruling will be to delete certain tracts from leasing and generally delay OCS leasing in Alaska (*id.* at 13). As we outlined in our petition (at 20-21), the adverse rulings put at risk the 621 leases issued offshore Alaska since the enactment of ANILCA, threatening the loss of more than $4.2 billion in bonuses received for those leases. Indeed, respondents even suggest that lessees might argue for recovery of their bid money (Br. in Opp. 13). Respondents may believe that such adverse effects on OCS leasing and exploration are a sound idea (*id.* at 14), but Congress has seen fit to declare that assessment of the extent of energy resources located on the OCS is to be achieved "at the earliest practical time" with "expeditious" development. See 43 U.S.C. 1802(9), 1332(3).

Respondents err in charging (Br. in Opp. 9, 10) that the Secretary has "ignore[d]" or "refus[ed] to consider" subsistence in planning lease sales. The Secretary extensively analyzed subsistence restrictions in the final environmental impact statement prepared for Sale 57, the thoroughness of which is evident in respondents' repeated references to the document in their own discussion of subsistence effects (*id.* at 4-5 nn.10, 11, 13, 14, 15). The final EIS for Lease Sale 83 similarly contains an extensive discussion of subsistence, even though no Native subsistence harvesting occurs in the Navarin Basin (see Pet. 7). The district court specifically found that "the Secretary considered the relevant factors" under Section 810 (Pet. App. 42a; see also *id.* at 37a), albeit not with the mandate of the statute "clearly in mind" (*id.* at 38a). And since *Gambell I*, the Secretary has been conducting subsistence analyses under the express terms of Section 810, including Section 810 analyses for

each new exploration plan (see, *e.g.*, Pet. App. 107a), and a Section 810 subsistence reevaluation for Sale 57 (Pet. App. 81a-106a).

Notwithstanding the Secretary's extensive efforts to comply with Section 810 on the OCS, the courts have now blocked activity in three lease sale areas offshore Alaska, including Sale 57 and Sale 83 in *Gambell II* and Sale 92 in *Akutan*, based on extremely expansive readings of that provision. Having successfully urged upon the court below the expansive and strict reading of Section 810 upon which these rulings lie, respondents are hardly in a position to claim now that the Secretary "should encounter few problems in complying with" that provision (Br. in Opp. 14).

3. Respondents mischaracterize (Br. in Opp. 22-23) our contention that the decision below is inconsistent with this Court's decision in *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984). The issue we present is not, as respondents put it (Br. in Opp. 23), "whether any compliance effort is required at the leasing stage." The Secretary expressly recognizes that, if ANILCA applies to the OCS, a Section 810 evaluation is necessary at the leasing stage to determine whether significant restrictions on subsistence will then occur. For this reason, after *Gambell I* issued, the Secretary prepared a leasing stage subsistence re-analysis for Sale 57 (Pet. App. 81a). The court of appeals rejected the Secretary's analysis, however, because it disclosed possible subsistence restrictions at the production and development stage, but did not carry out the second tier hearing and findings procedures of Subsections (a)(1)-(3) (Pet. App. 13a-14a). Our petition quite plainly challenges the court's holding that Section 810 requires a hearing and findings at the leasing stage even when the Secretary has found that any possible effects will be confined to the production and development stage.[4] By focusing on a non-issue, respond-

[4] The problems posed by this holding are now even more acute due to the Ninth Circuit's ruling in *Akutan* that the procedures of

ents fail to rebut our showing of a conflict with this Court's holdings in *Secretary of the Interior* v. *California*, *supra*, that "[e]ach stage [of the OCS process] involves separate regulatory review * * *," and that Congress instituted staged consideration "to forestall premature litigation regarding adverse environmental effects that all agree will flow, if at all, only from the latter stages of OCS exploration and production" (464 U.S. at 337, 341 (footnote omitted)).[5]

4. The majority in *Gambell II* acknowledged that *Gambell I* had "established a new principle of law," but concluded that "retroactive application of *Gambell I* would further the operation of the statute * * *," and would not lead to "substantial inequitable results" (Pet. App. 24a). In our petition (at 27-28) we showed why retro-

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Subsection (a)(1)-(3) must be carried out at the leasing stage even when the Secretary has specifically found that significant restrictions on subsistence uses are " 'unlikely' " at the production and development stage (App., *infra*, 7a).

[5] Cases respondents cite (Br. in Opp. 23) support our contention that compliance with environmental laws should be judged in light of the multi-stage structure of the OCSLA. See *Village of False Pass* v. *Clark*, 733 F.2d 605, 608-609, 610-612, 614-616 (9th Cir. 1984) (upholding Secretary's reliance on future opportunities to comply with NEPA and Endangered Species Act at later OCS stages); *North Slope Borough* v. *Andrus*, 642 F.2d 589, 595 (D.C. Cir. 1980) ("a purpose of OCSLA is to permit an expedient resolution of preliminary matters in the development of oil lands while preserving administrative and judicial review for future times when potential threats to the environment are readily visualized and evaluated"); *Conservation Law Foundation* v. *Andrus*, 623 F.2d 712, 714-715 (1st Cir. 1979) (rejecting Endangered Species Act challenge to lease sale based on Secretary's reserved powers to enforce that Act at later stages); *County of Suffolk* v. *Secretary of the Interior*, 562 F.2d 1368, 1378 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978) (rejecting lease sale NEPA challenge based on Secretary's ability to gather information and modify OCS project at future stages); *Sierra Club* v. *Morton*, 510 F.2d 813, 828 (5th Cir. 1975) (same). To the extent that respondents cite these cases for the proposition that the Secretary must, at the lease sale stage, take an overview of possible subsistence impacts at later stages, the Secretary has clearly already done so (see, *e.g.*, Pet. App. 85a-106a).

active application of *Gambell I* to a lease sale area where no Native subsistence occurs, and where Interior had already studied the subsistence issues, served no possible purpose (see also Pet. App. 31a-32a (Dimmick, J., dissenting)). Respondents make no attempt to rebut this point, but instead argue (Br. in Opp. 24-25) that the majority erred in characterizing its result as retroactive. Respondents do not deny that *Gambell I* was a novel interpretation of Section 810. Instead, they contend that there is nothing retroactive about applying the rule of *Gambell I* to a lease sale which took place after the complaint in *Gambell I* was filed, but before the novel construction of Section 810 was announced.

Respondents have apparently mistaken the inquiry whether a rule should be applied retroactively for the threshold issue whether a particular construction is, in fact, retroactive. With regard to the threshold question, there can be no serious doubt that applying *Gambell II* to Lease Sale 83 amounts to a retroactive application, as the court of appeals itself recognized. With respect to the distinct issue respondents appear to be addressing, surely the Secretary and the companies were justified in proceeding with Lease Sale 83 when no one had challenged *that* sale (which took place in an area not used for Native subsistence), and when the district court in the Sale 57 case had recently upheld the Secretary's interpretation that Section 810 did not apply to the OCS (see Pet. App. 32a (Dimmick, J., dissenting)).

5. Finally, respondents argue (Br. in Opp. 15-17) that the petition is untimely. In particular, respondents argue that the Secretary was required to re-argue the non-applicability of Section 810 to the OCS on remand following *Gambell I* in order to preserve the issue for this Court's review (Br. in Opp. 16-17). This contention is totally unsupported by the Court's precedent and would invite both premature filings in this Court and wasteful arguments in the lower courts. As we have previously noted (Pet. 22 n.11; 85-1608 Br. in Opp. 10

n.5), the decision in *Gambell I* expressly remanded questions regarding the scope of the Secretary's ANILCA responsibilities to the district court. Hence, unlike the court's ruling on aboriginal title, the ANILCA ruling was clearly interlocutory in nature and review by this Court is still timely. See, *e.g.*, *Falk* v. *Brennan*, 414 U.S. 190, 194 n.7 (1973); *Hamilton Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); see generally R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 316 (6th ed. 1986).[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, together with the petition in No. 85-1239, and the two cases consolidated for purposes of oral argument.

CAROLYN B. KUHL
Acting Solicitor General *

RALPH W. TARR
Solicitor
Department of the Interior

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[6] Although the Secretary was not obligated to relitigate the threshold ANILCA issue, we note that the Secretary never abandoned his position that Section 810 was inapplicable to the OCS, both in his Section 810 compliance documents prepared after *Gambell I* (see Pet. App. 82a) and in the brief before the court of appeals in *Gambell II* (see Br. 9 (noting that certiorari had not previously been sought because the ruling in *Gambell I* was interlocutory and that the Secretary adhered to the view that ANILCA did not apply to the OCS)).

* The Solicitor General is disqualified in this case.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 86-3512/86-3514/86-3517

DC Nos. CV-A85-701-V
CV-J85-037-V
CV-J85-038-V

TRIBAL VILLAGE OF AKUTAN, ET AL.,
PLAINTIFFS-APPELLEES

vs.

DONALD P. HODEL, ET AL.,
DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the District of Alaska
James A. von der Heydt, District Judge, Presiding

Argued and Submitted March 14, 1986
[Filed Apr. 28, 1986]

MEMORANDUM*

Before: DUNIWAY, GOODWIN, BRUNETTI, Circuit Judges

In this consolidated appeal, appellants Secretary of the Interior, ten oil companies, and others, seek review of a district court order granting a preliminary injunction restraining the Secretary from proceeding with Lease Sale 92 in the North Aleutian Basin. We affirm.

I. BACKGROUND

Lease Sale 92 is proposed as part of the Department of Interior's current five-year offshore oil and gas leasing program, established under section 18 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1344. In preparing for the Sale, the Secretary was required to conduct an evaluation of the effects of the sale on subsistence uses and resources pursuant to section 810(a) of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. § 3120(a). Section 810(a) can be described as consisting of two tiers, the first requiring an evaluation, and the second, under the appropriate circumstances, requiring notice, hearings, and minimization of adverse impact upon subsistence uses and resources.

The Secretary conducted an evaluation pursuant to the first tier of section 810(a), but based on his finding that significant subsistence restrictions were "unlikely," declined to undertake the second tier procedures of noticed hearings and mitigation of environmental harm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Following the Secretary's announcement in December 1985, of his decision to go forward with Lease Sale 92, appellees the State of Alaska, Trustees for Alaska, the Tribal Village of Akutan, and others, filed suit in federal district court. The parties sought a preliminary injunction against the receipt and opening of bids based on violations of ANILCA and other statutes.[1]

On January 13, 1986, the district court enjoined the Secretary from proceeding with the bidding process in Lease Sale 92. Invoking two recent Ninth Circuit decisions construing ANILCA, the court concluded that the Secretary had applied an incorrect legal standard in determining his duties under section 810(a) and accordingly had failed to comply with the notice and hearing requirements in section 810(a)(1)-(3). Specifically, the court held that, notwithstanding the Secretary's finding that subsistence restrictions were unlikely, where a proposed action "may significantly restrict subsistence uses," the Secretary is required to proceed with notice and hearing under the second tier of section 810(a). Memorandum and Order at 2-3, *citing People of the Village of Gambell v. Hodel (Gambell II)*, 774 F.2d 1414, 1421-22 (9th Cir. 1985), and *Kunaknana v. Clark*, 742 F.2d 1145, 1151 (9th Cir. 1984). The district court concluded that appellants had established a strong likelihood of success on their ANILCA claim, and that an injunction was required as a matter of course under *Gambell II*, 774 F.2d at 1422-26.

---

[1] Appellants alleged violations of section 19 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1345, section 102(c) of the National Environmental Policy Act, 42 U.S.C. § 4332(c), and sections 7 and 9 of the Endangered Species Act, 16 U.S.C. §§ 1536, 1538.

Having granted a preliminary injunction based on appellants' ANILCA claim, the court declined to address the other alleged statutory violations.

II. STANDARD OF REVIEW

Our review of a ruling on a motion for a preliminary injunction is "very limited." *Apple Computer, Inc. v. Formula International, Inc.*, 725 F.2d 521, 523 (9th Cir. 1984). "The grant or denial of a motion for a preliminary injunction lies within the discretion of the district court," *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982), and will be reversed only for an abuse of discretion or if the decision is based on an erroneous legal standard. *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985).

"To obtain a preliminary injunction, a party must show either 1) a likelihood of success on the merits and the possibility of irreparable injury, or 2) the existence of serious questions going to the merits and the balance of hardships tipping in its favor." *Apple Computer*, 725 F.2d at 523. Absent unusual circumstances, irreparable damage is presumed and an injunction is required when an agency violates ANILCA section 810(a). *Gambell II*, 774 F.2d at 1422-23.

Because the preliminary injunction rested solely on the district court's interpretation of section 810(a), our review is, as a practical matter, *de novo*.

III. DISCUSSION

The central issue before us can be simply framed: When do the notice and hearing requirements under ANILCA section 810(a) apply? Must the Secretary find that a proposed action "*would* significantly re-

strict subsistence uses?" 16 U.S.C. § 3120(a) (emphasis added). Or is a finding that significant restrictions "*may*" result sufficient, even though such restrictions are deemed unlikely?

The Secretary contends that a finding that a proposed action "would" significantly restrict subsistence uses is required to trigger section 810(a)(1)-(3) notice and hearing procedures. He offers the following arguments in support of his construction: 1) this court's decisions in *Kunaknana* and *Gambell II* do not require compliance with section 810(a)(1)-(3) absent a likelihood of significant restrictions upon subsistence resources, and 2) the Secretary's construction is required by the plain language of the statute and is entitled to judicial deference. We consider these arguments in turn.

A. *Kunaknana* and *Gambell II*.

In *Kunaknana v. Clark*, 742 F.2d 1145 (9th Cir. 1984), we read section 810(a) as requiring notice and public hearings "if the agency first concludes that the contemplated action *may* significantly restrict subsistence uses." *Id.* at 1151 (emphasis added).

> The inference to be drawn from [the phrase "which would significantly restrict subsistence uses"] is that Congress intended a two-step process: first, the agency determines whether the contemplated action may significantly restrict subsistence use; if it may, the agency must comply with the notice and hearing procedures. This construction of the statute is a reasonable one, relying on the plain meaning of the words of the statute.

Id.

Although the *Kunaknana* court was not called upon specifically to decide when section 810(a)(1)-(3) procedures would be required, its analysis has subsequently formed the basis for a holding in this circuit.

In *People of the Village of Gambell v. Hodel (Gambell II)*, 774 F.2d 1414 (9th Cir. 1985), the Secretary's section 810(a) evaluation indicated that development and production of the proposed lease sale "may significantly restrict subsistence uses in certain areas." *Id.* at 1422. The court held that under *Kunaknana* the Secretary's finding required that he proceed with the notice and hearing procedures under section 810(a)(1)-(3). *Id.*

Moreover, the argument that the Secretary makes here was presented in nearly identical form to the *Gambell II* court:

> Interior has interpreted the language of Section 810 to require a likelihood of a significant restriction to be evident before the procedures of Subsections 810(a)(1)-(3) come into play. Thus, it found here that "given the low probability that oil will be found, these possible restrictions [at the production stage] are not likely to occur, even locally, as a result of the sale" . . . . It also found that significant restrictions on subsistence at the exploration stage "are not likely * * *" . . . .

Supp. ER, Vol. II, Ex. 10, CR 32.

The *Gambell II* court rejected the Secretary's view that section 810(a)(1)-(3) procedures required a *likelihood* of significant subsistance restrictions, and, on findings not meaningfully different than those here, concluded that the Secretary was required to

comply with the notice and hearing requirements of the statute. We believe that *Gambell II* governs this case, and that the district court did not err in determining that appellants had shown a strong likelihood of success on the merits of their claim that the Secretary had failed to comply with the notice and hearing requirements of section 810(a)(1)-(3).

B. *Plain Language and Deference to Agency Interpretation*

The Secretary next urges that his interpretation of section 810(a)(1)-(3) is required by the plain language of the provision, and, as an agency's interpretation of a statute it is charged with administering, is entitled to a high degree of judicial deference and must be upheld unless unreasonable. Both these arguments might be compelling in the abstract, but because we consider *Gambell II* plainly controlling, they do not alter our conclusion that compliance with section 810(a)(1)-(3) procedures is required before the Secretary may proceed with Lease Sale 92. *See Cubanski, etc. v. Heckler*, No. 85-7123, slip op. at 7, (9th Cir. March 6, 1986) (courts are the final authorities on issues of statutory construction).

CONCLUSION

The district court applied the correct legal standard in concluding that the Secretary must comply with the notice and hearing procedures in ANILCA section 810(a)(1)-(3) when he finds that significant restrictions on subsistence uses are "unlikely." Having identified a probable ANILCA violation, the court did not abuse its discretion in granting a preliminary injunction. AFFIRMED.

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Nos. 85-1239, 85-1406

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

ARCO ALASKA, INC.; AMOCO PRODUCTION COMPANY; et al.,

Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL; et al.,

Respondents.

DONALD P. HODEL, Secretary of the Interior; and UNITED STATES DEPARTMENT OF THE INTERIOR,

Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL; et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC., AND THE ALASKA SUPPORT INDUSTRY ALLIANCE IN SUPPORT OF PETITIONERS, SECRETARY OF THE INTERIOR, ET AL.

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This motion of Resource Development Council for Alaska, Inc. (RDC), and Alaska Support Industry Alliance (ASIA) to file the annexed brief amicus curiae is respectfully made pursuant to Supreme Court Rule No. 36. All parties have given their oral consent to this amicus

curiae brief. However, due to the insufficient time to physically procure the parties' individual written consents and still comply with the parties' intended briefing schedule, the applicants herein have not been able to lodge the parties' consents with the Clerk of the Court, and proceed instead by way of motion for leave to file the annexed amicus brief. As soon as the parties' written consents have been obtained, applicants, Resource Development Council for Alaska, Inc., and Alaska Support Industry Alliance, will lodge them with the Clerk of this Court.

Resource Development Council for Alaska, Inc., is a nonprofit corporation composed of some 10,000 members. Membership includes people in government, education, business (both management and labor), and many from various other segments of the private sector. RDC is dedicated to creating a broad-based, diversified, and stable economy for Alaska. It advocates developing Alaska's resources in an orderly manner, creating long-term, stable employment improving living standards. and reducing living costs for Alaskans. RDC supports reasonable and necessary environmental protection of Alaska's priceless fish, waterfowl, and marine mammal resources.

Alaska Support Industry Alliance is an association of some 200 employers doing business in Alaska. Membership provides equipment, supplies, and services to the state's oil, gas, and mining industries. The membership is extremely broad, representing engineering companies and constructors, architects, attorneys, oil well loggers,

and drilling firms. Also included are caterers, transportation companies, equipment vendors, and diving firms. ASIA has union and nonunion employers, with all sizes of employers represented. The unifying focus of ASIA is an awareness of the critical role of the state's oil and gas industry for the social and economic fabric of Alaska. ASIA fully supports reasonable environmental regulation of petroleum resource development activities.

The issues posed by the petitions for writ of certiorari in this case are of national significance, exceeding even the interests of parties from Alaska where this controversy originated. The proper role of federal courts in enforcing environmental statutes, the proper interpretation of those statutes, and the correct judicial construction of congressional intent in the enactment of such statutes are issues that reach beyond the confines of the State of Alaska. Nevertheless, amici are directly affected by such questions in a particularly direct manner. Their experience with the results of the statutory construction and interpretation that necessitate the petition in this case forms a unique public interest perspective that is well-suited to providing the Court with additional argument. Amici, Resource Development Council for Alaska, Inc., and the Alaska Support Industry Alliance, have concluded that, because of the national significance of these issues, the present parties cannot adequately represent the interest of the broader public while at the same time representing their own particularized positions.

For the foregoing reasons, Resource Development Council for Alaska, Inc., and the Alaska Support Industry Alliance request that this motion to file the annexed brief amicus curiae be granted.

DATED: March 4, 1986.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC., AND ALASKA SUPPORT INDUSTRY ALLIANCE IN SUPPORT OF PETITIONERS, SECRETARY OF THE INTERIOR, ET AL.

INTEREST OF AMICI

As initially set out in Resource Development Council for Alaska, Inc. (RDC), and Alaska Support Industry Alliance's (ASIA) preceding motion for leave to file this brief, RDC and ASIA are organizations which represent a broad spectrum of the public vitally interested in the fair and accurate interpretation of the environmental and conservation statutes that guide the exploration for and development of Alaska's vast offshore petroleum energy resources. RDC and ASIA represent individuals and organizations, both private and governmental, whose economic survival will be, and is now being, severely and negatively impacted by erroneous legal rules and statutory constructions emanating from the United States Court of Appeals for the Ninth Circuit's decision in this and related cases.

The Ninth Circuit's announced rule of a *per se* requirement of injunctive relief upon a *prima facie* showing of violation of an environmental or conservation statute has operated to unreasonably restrict the opportunities of RDC and ASIA's members to pursue their livelihoods and count upon stable sources of income. By unnecessarily shutting down the enormously expensive process of outer continental shelf (OCS) development and rendering that process even more uncertain, this unprecedented departure from traditional equity principles has cost untold amounts in lost employment and economic opportunity for Alaskans and other Americans.

The Ninth Circuit's construction of Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120, has the capacity for producing the same negative effects on the Alaska and national economies. By requiring the Secretary of the Interior to

attempt to evaluate effects of OCS exploration and development or production at a time in the leasing process when such effects are uncertain and speculative at best, the Ninth Circuit's decision in this case casts a completely unnecessary cloud on the legitimate pursuit of environmentally sensitive OCS development activities. The result is the unwarranted waste of time and pointless duplication of regulatory processes.

Finally, the Ninth Circuit's decision in this case has ignored legislative history and thereby subverted congressional intent regarding expeditious OCS inventorying and development. RDC and ASIA represent individuals and organizations engaged in such inventorying and development who have been deprived of the ability to do so efficiently and economically. The Ninth Circuit has attempted to redefine the public and national interest in a manner unintended by Congress and clearly harmful to amici's interest in their members' ability to pursue their livelihood. Amici in this case are in the position of representing all parties who ask that the courts respect the policy choices of our national representatives.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 774 F.2d 1414 (9th Cir. 1985).

D. *Materials*—$2,500,000

At this date all materials have been ordered for the 1985 drilling program. This dollar amount represents an assumed 20% restocking fee for approximately $12,300,000 worth of total materials which have been purchased. Since all materials will soon be enroute to the Navarin Basin area, shipping charges have been incurred, but have not been included in this amount.

E. *Other*—$500,000

Consultants have been hired, satellite communications systems have been leased and a significant amount of company manpower has already been committed to the 1985 drilling program.

Total—$35,000,000

This figure represents the amount of financial burden Amoco will bear in the event that the 1985 drilling program is cancelled on or before June 1. The amount will increase substantially after June 1, 1985, as we actually commence operations in the area.

Amoco, as operator for itself and other interest owners, expects to spend at least $75 million in the 1985 exploratory drilling program for the Navarin Basin. An extensive effort has been made by Amoco and other operators to ensure that the impact on the environment from the exploratory drilling in the Navarin will be mitigated.

7. The practical result of any delay from an injunction preventing exploratory activity during any portion of the 1985 drilling season, would be twofold. First, due to the relatively short drilling season, it could likely preclude any exploratory drilling activity during the 1985 drilling season, even if an injunction was entered for only a few months. Secondly, an injunction resulting in delay would

be financially significant to Amoco as virtually all equipment is standing by and ready to be mobilized in May, 1985, to commence drilling activity in June, 1985.

8. A complete prohibition of the 1985 exploratory drilling season would cost Amoco and its partners a minimum of $35,000,000; most, if not all, of this would be unrecoverable in this or subsequent years, as they are based on contractual terms for the 1985 drilling season *only*. It is most certainly too late to mobilize this specialized Navarin array of equipment for use in other areas of the world. With such a significant loss, Amoco's potential future commitment to exploration in this area may be drastically reduced.

D. AMOCO'S SEISMIC ACTIVITY DURING 1985

9. Amoco will not conduct "shallow hazard" or "deep" seismic activity during the 1985 drilling season on the tracts leased in OCS Sale 83.

E. OIL SPILL CONTINGENCY PLAN

Attached hereto as Exhibit "A" is a brief summary of Amoco's Navarin Basin Oil Spill Contingency Plan and Response Equipment Summary. The complete Oil Spill Contingency Plan is covered in a 286 page document prepared specifically for Amoco's operations in the Navarin Basin. It has been previously submitted to the Mineral's Management Service as part of the overall regulatory approval process.

F. HARM TO THE NATION

10. The day when industry will be able to produce petroleum from the Sale 83 area recedes further into the future when exploratory drilling operations are delayed. Reserves located within the Sale 83 area are estimated by the Minerals Management Service to be in excess of 1.2

billion barrels of oil and 7.7 trillion cubic feet of natural gas (unrisked mean estimates). This compares to total U.S. proven Reserves, as of December 31, 1983, of 27.7 billion barrels of oil and 200 trillion cubic feet of natural gas. It should be apparent that the nation has a compelling interest in the expeditious development of these valuable energy resources.

/s/ R. J. CRISWELL
R. J. Criswell

STATE OF COLORADO)
CITY & COUNTY OF DENVER) ss.

The foregoing instrument was acknowledged before me this 7th day of May, 1985, by R. J. CRISWELL.

WITNESS my hand and offical seal.

/s/ GERILYN MARI
Gerilyn Mari
Notary Public

My Commission expires:
August 27, 1986
1670 Broadway
Denver, CO 8020

EXHIBIT A

AMOCO PRODUCTION COMPANY
NAVARIN BASIN OCS SALE 83 AREA
SUMMARY OF OIL SPILL CONTINGENCY
PLAN AND RESPONSE EQUIPMENT

The Oil Spill Contingency Plan for Amoco Exploration Operations in the Central Bering Sea (OCS Lease Sale Area No. 83) is designed to assist Amoco personnel and contractors in responding rapidly and effectively to oil spills that may result from the exploration and fuel transfer operations on the drilling rigs and vessels operating within the area. Two drilling rigs will be operating simultaneously in the Navarin Basin and will be refueled and resupplied from a tanker and wareship. A total of four supply boats will be used to transfer the fuel and supplies to the drilling rigs. In addition, a standby vessel (picket boat) will be stationed full time at each drilling rig for use in the event of emergencies (e.g., oil spills, evacuation, etc.).

The Amoco Spill plan complies with regulations of the U.S. Minerals Management Service (MMS) for exploration and development of the Outer Continental Shelf (OCS), Part 251 of Title 30 of the Code of Federal Regulations effective June 16, 1983, which incorporates OCS orders by reference. The Amoco Oil Spill Contingency Plan contains the following:

a. Provisions to assure that full resource capability is known and can be committed during an oil spill, including the identification and inventory of applicable equipment, materials, and supplies which are available locally and regionally, both committed and uncommitted, and the time required for deployment of the equipment.

b. Provisions for various degrees of response effort depending on the severity of the spill.
c. Provision for identifying and protecting areas of special biological sensitivity.
d. Establishment of procedures for the purpose of early detection and timely notification of an oil spill.
e. Provisions for well-defined and specific actions to be taken after discovery and notification of an oil spill, including:
   (1) Specification of an oil spill response operating team consisting of trained, prepared, and available operating personnel.
   (2) Predesignation of an oil spill response coordinator who is charged with the responsibility of and delegated commensurate authority of directing and coordinating response operations.
   (3) A preplanned location for an oil spill response operations center and a reliable communications system for directing the coordinated overall response operations.

Amoco's spill plan considers spill frequency and probable spill trajectories, includes the use of state-of-the-art equipment, and provides an on-site trained team for spill response, as well as a major spill response team of experts in their respective fields for complete and efficient spill cleanup.

Amoco has invested approximately $50,000 in the development of the Oil Spill Contingency Plan and has also contracted for development of a $50,000 Navarin Basin Oil Spill Training Program specific to the 1985 drilling program. Actual drills will be conducted by Amoco, and the boat and rig contractor personnel, with leased equipment dedicated to our drilling program. Leased equipment costs are estimated at $500,000 for the 6 month

program. Additional spill response equipment valued at approximately $500,000 is warehoused at Dutch Harbor. This equipment is owned by an industry cooperative, Alaska Clean Seas, of which Amoco is a member. This oil spill cleanup equipment is also available for Amoco's use in the event of a major oil spill.

AFFIDAVIT OF JOSEPH G. JORGENSEN

RE: PEOPLE OF GAMBELL

v.

HODEL (9TH CIR. NO. 85-3877)

I, Joseph G. Jorgensen, am a professor of comparative culture and social science at the University of California, Irvine. I earned my Ph.D. degree in anthropology and linguistics at Indiana University in 1964 and subsequently held positions at Antioch College, the University of Oregon, and the University of Michigan. At the Universities of Oregon, Michigan, and California I have been responsible for the field methodology and statistics training of all graduate students within my departments, and for teaching the substantive and theoretical courses dealing with American Indians and Eskimos, past and present. My current rank is Professor, Step VII. I have directed more than 25 Ph.D. dissertations based on field research among American Indian and Eskimo societies.

Before entering graduate school in anthropology I was employed for two years in several different capacities by the Uintah and Ouray Ute Indian Tribe of eastern Utah. I conducted field research on contemporary Ute economics, social organization, political organization, and religious movements while a graduate student, and wrote my dissertation on Ute history and modern culture, demonstrating the political and economic causes of changes to reservation Ute life. Since completion of the dissertation over two decades ago I have conducted field research among three Ute societies, two Shoshone societies, the Crow Indians, the Soboba Indians, Unalakleet Eskimos, Gambell Eskimos, Canadian Arctic Eskimos, and briefly with several other Eskimo societies, Aleutian societies, American Indian societies, and rural American Anglo and Chicano societies. A large portion of my most recent field

research, particularly that in which I have engaged during the past decade, has focused on the consequences to western American Indians from energy extraction and production projects conducted on their reservations, or near to them (see Jorgensen et al 1978, Jorgensen ed. 1984). My research publications include a book on a religious movement among the Utes and Shoshones and the factors which provoked and sustain it (1972) (the book received the C. Wright Mills Award for 1973 and a Pulitizer nomination), a book on the comparative analysis of Salishan language, environment, and culture (1969), and a book comparing the environments, languages, and cultures of 172 western American Indian societies (1980).

I am a John Simon Guggenheim Fellow (1975), a member of the Executive Board of Directors of the Human Relations Area Files, Inc. (Yale), a former Director (Dean) of the Program in Comparative Culture, a former Chair of the Department of Anthropology, University of Michigan, a member of the Executive Board of Directors of the Anthropology Resource Center (Boston), a former member of two committees of the National Academy of Sciences (one dealing with soils, another with mining and reclamation, on both my expertise focused on social consequences to Indians from contemplated extraction programs), the recipient of several grants from the National Science Foundation, the National Institutes of Health, the Wenner-Gren Foundation, and the American Philosphical Society, an associate editor on several academic journals, and I delivered the Fort Lectures (1980), the M. Crawford Lectures (1980), and the Leigh Lecture at the Diamond Jubilee of the Study of Anthropology in Utah (1982). I was the architect and principal social science consultant to the multi-disciplinary, National Science Foundation-sponsored (RANN division) Lake Powell Research Project (1971-5), and the principal

social science consultant to the Northern Cheyenne Research Project (1975-8). Both of those projects addressed the question of the relations between Indian societies and the naturally-occuring resources on which, and among which they lived, and the social and cultural consequences to Indians in both places from energy developments.

In 1981 I was invited by the Minerals Management Service's Socio-Economic Studies Program (then the Bureau of Land Management) to assist a contractor (Louis Berger and Associates) to analyze the probable consequences to Eskimo villages if they were to become principal or secondary staging areas for oil drilling and pumping operations. The intention of the contractor and MMS was to use my knowledge of the consequences to American Indians from energy developments to assist in forecasting the consequences to Alaskan Native villages from various involvements with oil extraction and transportation. I conducted field research in Alaska and in the Canadian administrative and oil staging towns of Inuvik and Tuktoyuktuk during 1981 and prepared a set of scenarios, treated as postulates, that could forecast changes to subsistence, economic, political, social, and religious life in Alaska Native villages depending on their involvement with OCS oil operations.

Other research assignments among Eskimo villages followed. I orchestrated MMS's social indicators project, a study of four NANA (Northwest Alaska Native Association) and four APIA (Aleutian-Pribilof Island Association) villages in which we empirically developed a panel of 47 indicators (variables) that are sensitive to changes occuring in village life, including subsistence, economics, household-family organization, political organization, demography, and village institutions (Jorgensen, McCleary, and McNabb 1985). In 1982 I consulted MMS's socio-economic analysis and update of Norton Sound, and in that year I also assumed the role of principal investi-

gator in MMS's harvest disruption project. The project comprised three study areas, St. Lawrence Island, Norton Sound, and the Beaufort-Chukchi Sea. My associates and I focused our temporal and field research on the villages of Gambell and Savoonga (St. Lawrence Island), Unalakleet (Norton Sound, for which I also had principal field research responsibilities), and Wainwright (Chukchi Sea). This research was intended by MMS to answer questions heretofore unanswered about the amounts of naturally-occurring, renewable resources harvested and put to use annually by the residents of each village, and to demonstrate the relations among the harvests of naturally-occurring, renewable resources and Eskimo culture, particularly the economic, kinship, and religious organizations, and the values, that is, significant symbols, attached to naturally-occurring resources by villagers. Our research teams spent between six months and one year in the several villages, and follow-up trips to the villages continue to the present. Published research documents from the projects are available through MMS (Jorgensen and Maxwell 1984; Little and Robbins 1984; Luton 1985). I am currently finishing, under contract with MMS, a comparative analysis of the relations among naturally-occurring resources, subsistence, and culture for the three villages. In 1984 I was invited to testify at the Round Table Sessions of the Inuit Circumpolar Conference's hearings on the Alaska Native Claims Settlement Act. I delivered the discussion piece on consequences to Native Americans from Federal laws.

I was contacted by James A. Bamberger, Esq., Alaska Legal Services Corporation, to read the "Hold Harmless" agreement filed by the federal government and the oil companies re Gambell v. Hodel and respond as to whether that agreement has any substantive relation to the accurate definition of, valid empirical assessment of, and protec-

tion of the subsistence way of life of natives in Bering Sea and Norton Sound villages. Inasmuch as I have spent the better part of the past three years analyzing these exact questions in detail as they pertain to the villages of Unalakleet and Gambell (and Wainwright), I recognize the importance and the severity of the question.

The National Environmental Policy Act of 1969, as revised to 1978, requires that state-of-the-art analyses be applied to the abiotic, biotic, and social environment, and to the relations among them that may be significantly affected by an alteration to the enviroment planned by man. Our investigations of Gambell and Unalakleet sought to provide state-of-the-art analyses, that is, logically correct, empirically warranted analyses of the relations among environment, man, and culture in those Bering Sea-Norton Sound villages. Our data and analyses appear in the MMS publications referred to above. Neither the data nor the analysis which our research teams present support the invalid logic, *non sequitur*, and serious omissions in the "Hold Harmless" agreement which threaten native subsistence life, hence native culture, in the villages of Bering Sea-Norton Sound.

The "Hold Harmless" agreement poses a dangerous threat to the subsistence ways of life practiced by the residents of the Bering Sea, from Unalakleet on the east to Gambell on the West. The former gain their subsistence livelihood as well as their principal source of cash from salmon, herring, and roe-on-kelp. The latter gain their subsistence livelihood as well as their principal source of cash from walrus and walrus by-products. Natives in both communities and everywhere else in the Bering Sea region are closely articulated with sea mammals, and their relations to sea mammals are central to their relations with the environment and to their definitions of themselves as hunters, as Eskimos. Gambell natives, and their relatives

in the sister village of Savoonga, are organized into patriclans whose members share the bag and quarry from hunting, fishing, and collecting trips—resources moving from those who were successful to those who were not through explicit networks of kinspeople. Beyond the patriclans which link persons from several households within villages and between Savoonga and Gambell, resources are shared with the elderly and with friends as the exigencies of the moment dictate. To be a successful extractor, and to share the fruits of the endeavor are crucial to being an Eskimo in Gambell, Unalakleet, and all other native villages in which I have worked.

At Unalakleet persons and families are not organized into patriclans, but the equivalent is the large, bilateral extended family whose members reside in several households but who coalesce to hunt, fish, and collect naturally-occurring, renewable resources. Those resources are shared throughout the family and with affines (in-laws) in the village and beyond. The elderly residents of the village are always remembered and provided with food for their tables. In turn, the unfortunate hunter, even the unfortunate village can expect to receive resources from relatives of affines in distant villages when extracting ventures have been unsuccessful, or when weather, ice conditions, or other natural but irregular problems affect the availability and harvests of natural resources.

At Gambell and Unalakleet, indeed, all villages of the Bering Sea-Norton Sound region, harvests of naturally-occurring resources are unpredictable from season to season and year to year. The variability in quantity and quality of resources is so marked within and between seasons and from year to year that we began to focus our research on how natives in Gambell and Unalakleet adjusted to fluctuating resources. We sought to know how and when secondary, or unpreferred resources were sought, and when and why kinship or friendship networks

were invoked to receive or to give food. It was evident that "low" levels of disruptions to the harvests of naturally-occurring, renewable resources were ubiquitous, the norm. Everyday adjustments were made to these disruptions by eating non-preferred foods, or foods provided by family and friends from those families' stored supplies.

Disruptions to the harvests of naturally-occurring resources to an entire village is a much different issue from disruptions to the harvests of a family, even though one family's misfortune affects many other families. For example, weather and ice conditions can reduce resource availability below the levels of a previous year, and can also reduce the distribution of the resources, as well as the seasonal span in which they occur. They may restrict access to resources by impeding or preventing travel, and they may cause spoilage to food already harvested. Late spring ice break-up in Norton Sound and still later break-up of the Yukon negatively influences seal and bearded seal hunting for all Unalakleet, Shaktoolik, Golovin, and White Mountain hunters, whereas early spring break-up negatively influences the harvests of greens, birds, roe-on-kelp, and herring. Both early and late spring break-ups occur often enough so that they are regarded as normal conditions by villagers.

At Gambell early break-up, coupled with stormy weather, high seas, or dense fog, can severely influence harvests of whales and walrus. Both may migrate past the village during conditions when they cannot be hunted persistently and vigorously. If, moreover, there is no drift ice or pack ice onto which walrus and seals can haul-out, even these populations migrate beyond the reach of St. Lawrence Island hunters. Inasmuch as St. Lawrence Island hunters are much more dependent upon sea mammals than are the villagers of Norton Sound, and because St. Lawrence Islanders have many fewer secondary and tertiary resources which can be extracted when harvests of

their staples are interrupted, the subsistence problems for villagers in Gambell, and their sister village Savoonga, become dire so soon as harvests of sea mammals are interrupted for a single spring season. In such instances, as occurred at Savoonga in 1982, villagers share their preserved and stored foods, and lean heavily on patriclan assistance networks in Gambell and Nome. Patriclan leaders, exercising their authority, collected the sea mammals which had been bagged by their clansmen, and redistributed them, so that all clan members gained their share. It made no difference whether the clan leaders resided in Gambell, Savoonga, or even Nome. They collected and redistributed the animals harvested by Gambell hunters.

The 1982 subsistence year at Unalakleet was provident, yet the Yukon River villages experienced disastrous salmon catches because of extremely high run-off (carrying debris which destroyed or fouled nets, made it difficult to place nets, etc.). As a consequence, Unalakleet families in which members were married to persons from the Yukon River villages sent large quantities of food to their affines in those villages. Those resources, of course, were redistributed.

The preceding examples, although brief, demonstrate how Bering Sea-Norton Sound subsistence economies are organized, and in particular how sharing operates to move subsistence resources from successful hunters to unsuccessful ones. The patriclan organization of St. Lawrence Island is the basis of the subsistence economy, economic organization, and social organization, and instrumental in the political and religious organizations. The prestige that accrues to household and clan leaders is through successful leadership in the extraction of naturally-occurring resources, and through fair redistribution, that is centralized collection and subsequent sharing of those resources with persons in need. These relations extend outward to affines and friends. Moreover, the successful

whaling captains on St. Lawrence Island, themselves usually patriclan leaders or leaders of clan segments, are responsible for storing huge quantities of the bowhead whales that are landed each year. Those portions are then redistributed to all members of both St. Lawrence Island villages at the annual whale festival each summer. At Unalakleet, the chief difference from Gambell is that the principal subsistence economic, economic, and social units are extended bilateral families.

Hunting, sharing, knowing the conditions of the environment, coping with those conditions, and managing personal and village affairs in a communitarian fashion in which maintenance of the environment and subsistence resources are the uppermost concern is the precise reason for which the villagers of Gambell requested ownership of St. Lawrence Island. They sought ownership and control of the island, through a federal trust relationship if necessary, rather than monetary remuneration from the Alaska Native Claims Settlement Act fund and the threat of going public and losing control of their corporation in 1991. The fears of 1971 when ANCSA was enacted have not abated and the provision to go public in 1991 is the precise reason for which Gambell natives have sought to drop the city form of government and the village corporation, while investing political and economic decision making in an IRA government with expanded authority. Indeed, during my first visit to Gambell in 1982 I was asked by the elected and appointed officials of the city government, the IRA government, and the village corporation the advantages of transferring land ownership and all other economic and political powers to the IRA government (and to federal trusteeship). I consulted Monroe Price, Dean of the Cardozo School of Law, Yeshiva University, and David Case, Attorney with Ziontz, Pirtle, et al, about the availability of such a move and passed the opinions on to the village authorities.

Gambell natives recognize the threats to their culture from federal law, as well as from the vagaries of weather and ice. They also recognize the threats posed by oil drilling, extraction, and transportation to their island, the naturally-occurring resources on which their culture is based and which sustain their lives, and to their limited sovereignty.

Unalakleet natives are equally cognizant of the threat posed to them by the public stock sales provision in ANCSA, to the consequences from becoming a secondary transportation hub for Norton Sound as oil operations increase, and to the consequences to the naturally-occurring resources on which their subsistence economy and cash economy is based from oil operations, increased growth and competition for those resources, and from the vagaries of nature.

Given the rigors of the Bering Sea-Norton Sound environments and the close connections between the Eskimo cultures of those areas and the harvests of naturally-occurring, renewable resources, the "Hold Harmless" agreement appears to be an ignorant and obtuse document. It surely doesn't qualify as a protection of the Eskimo way of life.

My central concerns are with sections (3)(a) and (b). The first three paragraphs of (3)(a), (1, 2, 3), are acceptable inasmuch as they specify that significant restrictions on harvests of naturally-occurring subsistence resources can be caused by the reduction of availability through decline, through alteration of their distribution or their location, or through delimitation of access by subsistence harvesters (extractors). These are measurable criteria, applicable to all Bering Sea-Norton Sound villages. There follows, however, a *non sequitur* in which "significant restrictions" are defined. By the "Hold Harmless" agreement, "significant restrictions" do not fit with the empirical reality of Eskimo subsistence and culture in the Being Sea-Norton

Sound area, hence the definition is a *non sequitur.* According to the authors of the agreement, significant restrictions shall not include "slight effect(s)" as opposed to "larger or substantial effects" on subsistence resources. Inasmuch as neither "slight" nor "larger or substantial" effects is defined, neither has an empirical referrent, neither is measurable, neither can be monitored. The issue, however, is the maintenance of the Eskimo subsistence life style and all that that phrase portends.

Our research demonstrates that low harvest disruptions are the norm throughout the Bering Sea-Norton Sound area. We have defined "low" levels of disruption. We have also defined "medium" levels of disruption. For example, at Unalakleet disruptions to combinations of three predominant staples and secondary food sources (any combination) for two consecutive seasons that render those resources inaccessible, or that destroy them after they are acquired satisfy the definition of a medium level of disruption. At Gambell, disruptions to two marine mammal species, or one marine mammal species and three other species, or six species other than marine mammals which render them inaccessible for two seasons of the year constitute medium level disruptions. Those definitions can be fitted with empirical data, hence can be monitored.

It is not known what the "Hold Harmless" agreement means by "slight effect(s)," but I presume it means something greater than the harvest disruptions that are experienced as the norm. If so, slight effects are, in fact, dire effects. And what, possibly, is meant by "large or substantial effects?" We define "high" levels of disruption for Unalakleet as disruptions which render inaccessible combinations of four predominant staples and secondary food sources throughout a year. Inasmuch as twelve of the sixteen types of naturally occurring resources on which Unalakleet natives rely are dependent on the sea, a major and protracted disruption to Norton Sound affecting some combination of four key sea mammals (seal oil, in par-

ticular, is eaten with virtually all preserved foods throughout the year), and/or fish, and/or waterfowl would have severe consequences for native subsistence regardless of the availability of land mammals, inland birds, and plants, and might affect tertiary food sources as well (marine invertebrates, roe-on-kelp, less exploited sea mammals). Noise from drilling might affect local availability of sea mammals, as might movement of oil barges, whereas a major oil spill, in conjunction with heavy and persistent storms through a winter, spring, summer, and fall, could affect access to resources, access to the spill area (perhaps ice locked and moving), deposition of oil in the tidal kelp, spawning migrations of anadramous species, haul-out areas for sea mammals, freezing of sea mammals, freezing of water fowl, inaccessibility of food for diving birds, and migratory routes for beluga and walruses.

At Gambell, "high" levels of disruption are defined as extending the conditions of a medium level through one more season. Gambell, then, so quintessentially dependent on a few major sea mammal species, would experience high level disruptions and crippling consequences in three seasons, rather than a full year as we forecast the case to be in Unalakleet. Indeed, high level disruption can be achieved even sooner if the Pacific walrus or any of the whale species are disrupted in the spring, or the three major seal species are jointly disrupted in the fall and winter.

The definitions of significant restrictions in the "Hold Harmless" agreements are meaningless. Yet, the applications of "significant restrictions" even though they are undefined and empirically unwarranted, are potentially pernicious. It is stated in (3)(b) that consequences shall mean losses of subsistence food or other physical subsistence resources. This, of course, is invalid logic inasmuch as there is no difference between "significant restrictions" and "consequences." Moreover, if the "Hold

Harmless" agreement were put into effect, we learn that consequences shall not include claims for psychological, cultural, religious, emotional, or similar losses. The losses referred to would be severe: deprivation of power, status, esteem, would surely follow from protracted slight, large or substantial effects on subsistence resources, assuming that our definitions of medium and high level disruptions are used to measure those disruptions. A quick perusal of the social and religious movement research literature will confirm this claim (see, for example, Aberle 1966, Jorgensen 1972, Mooney 1896). Kinship organizations will be altered as leaders can no longer provide for their kinspeople, affines, friends, and the elderly. Out migration may be required by families. Compulsory relocation inevitably has serious emotional, psychological, and cultural consequences for the relocatee (see Scudder and Colson 1982 for a summary of the research literature). Political and economic factionalism often results. And powerlessness generates a host of responses, too numerous to cite here. Eskimo longing for space and place, for their subsistence life style and the cultural rules which inform it and, at the same time, are based upon it, will be a deep problem. Yet, these "claims" are summarily dismissed by definition, just as significant restrictions shall not include slight disruptions by definition. The "Hold Harmless" agreement, if implemented, will be a travesty for Bering Sea-Norton Sound Eskimos, not simply their subsistence life styles.

The mitigations for large or substantial effects on subsistence resources are callous and incommensurable with the loss of naturally occurring species. Whales are treated as brothers, thanked for their gentleness and generosity, and shared in a festival of thanksgiving. In their place, the "Hold Harmless" agreement would substitute beef. Had the authors of the agreement an aggregate ounce of wit they might have poked in the history of federal

government-Indian relations for a culturally appropriate model for the substitution of beef for a naturally occurring subsistence resource on which a native people traditionally subsisted. For instance, at Rosebud and other Dakota reservations in the early 1880s, soon after the American bison population had been reduced from millions to about 1,500, and during the period when Dakota were restricted to their shrivelling reservations, the Indian were provided with rations of beef to replace the wanton destruction of the bison and the restriction of Indians from the chase. Indian agents had the idea of herding the cattle, which arrived on the hoof, to nearby hills, where they would be stampeded toward mounted Indians armed with pistols and short rifles (Pancoast 1883). Perhaps the "Hold Harmless" agreement could specify that beef would arrive on the hoof, dressed out with water wings. They could be dumped in the Bering Sea and the Gambell patriclan task groups could give chase in their 16′ skiffs.

/s/ JOSEPH G. JORGENSEN

Joseph G. Jorgensen
Professor
Program in Comparative
Culture and Social Science
University of California,
Irvine
Irvine, California 92717

Gillian Cannon, Notary Public

State of California)
County of Orange) ss.

On June 17, 1985, before me the undersigned, a Notary Public for the State of California, personally appeared Joseph G. Jorgensen, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument, and acknowledged that he executed it.

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AFFIDAVIT OF RONALD L. LITTLE

STATE OF ALASKA) ss.
THIRD JUDICIAL DISTRICT)

Ronald L. Little, being first duly sworn, deposes and states that:

1. My name is Ronald L. Little, and I reside at 481 Spring Creek Road, Providence, Utah 84322. My educational experience includes a B.S. in Psychology from the University of Utah (1963) and a Ph.D. in Sociology from the University of Oregon (1970).

2. I am an Associate Professor of Sociology, and serve as Assistant Department Head and Director of the Institute for Social Science Research on Natural Resources, Utah State University. My academic specialties are Research Methods and Statistics, Philosophy of Science, Ethnic Group Relations, and Sociology of Natural Resources.

3. My experience with the subsistence communities of Gambell and Savoonga includes serving as Senior Scientist, 1981-1984, Harvest Disruptions Study, John Muir Institute, conducted for Minerals Management Service, Anchorage, Alaska; 1984-1985, continuing research and writing on St. Lawrence Island, partially funded by College of Humanities, Arts and Social Sciences, and Department of Sociology, Utah State University.

4. At the request of James Bamberger, attorney for appellants, I have examined and evaluated the likely consequences of the "Hold Harmless Agreement" for the Eskimo residents of St. Lawrence Island. The Agreement was submitted to this court by Amoco Production Company, ARCO Alaska, Inc., and Exxon Corporation, the U.S. Department of Justice and the U.S. Department of Interior.

5. Before assessing the consequences of the agreement, certain logical and/or linguistic problems with the Agreement must be discussed. The first problem encoun-

tered has to do with the definitions used to articulate the intended meaning of the phrase "significant restrictions." The first three definitions of "significant restrictions" contained in paragraph 3 imply that any reduction in resource populations (¶3(a) (1)), and alteration in resource distributions which leads to a reduction in resource availability (¶3(a)(2)), or any limitation of access by subsistence harvesters (¶3(a)(3)) constitutes a "significant restriction." However, the last sentence of that same paragraph states that " 'Significant restrictions upon subsistence uses' shall not include 'slight effect[s] as opposed to large or substantial effects.' " Insofar as this fourth definition follows the first three difinitions, it must be assumed that the meaning of this definition supersedes the meanings contained in the first three definitions and that significant restrictions are limited to "large or substantial effects."

6. Even if such an assumption is made, the definitional problem is not resolved, for nowhere in the document are (a) slight, (b) large or (c) substantial effects defined. Without specific rules for quantifying these three levels of effects, any determination or evaluation of significant restrictions upon subsistence resources is dependent upon the whim and fancy of the observer/evaluator. *Compare* R. Little and L. Robbins, *Effects of Renewable Harvest Disruptions on Socioeconomic and Sociocultural Systems: St. Lawrence Island,* Alaska OCS Socioeconomic Studies Program, Technical Report No. 89 (June 1984) where we distinguished between low, medium and high level subsistence disruptions.

7. In addition to the absence of quantification rules for determining the levels of harvest restrictions, nowhere in the Agreement is the process for selecting an observer/evaluator specified, nor are the technical and/or professional qualifications of a person who is to be considered for such a position delineated.

8. Finally in this regard, the Agreement provides no mechanism or procedure for continued and regular monitoring of any significant restrictions upon subsistence uses. Without continuous scientific monitoring, any claims presented to the energy firms by Natives for relief under paragraph 5 of this Agreement become subject to dispute and could force St. Lawrence Islanders into more-or-less continuous litigation. Insofar as Island governments can ill-afford the financial burden of litigation, the Agreement places undue hardships upon all-too-scarce Island resources.

9. A second definitional problem is encountered with the definition of "consequences." As defined in paragraph 3(b) the term loses its traditional meaning: "Something that logically or naturally follows from an action." *The American Heritage Dictionary,* Second College Edition, Houghton Mifflin Company, (1982). In the Agreement consequence is transformed into "losses of subsistence foods." Agreement at ¶3(b). In essence, "consequence," as defined, becomes equivalent to "significant restrictions upon subsistence uses" and the first sentences of paragraphs 1 and 2 become non sequiturs.

10. Ignoring the logical and linquistic problems just discussed, paragraph 3(b) creates significant problems in any evaluation of the consequences (normal usage) of the Hold Harmless Agreement. As a result of the nominal definition introduced for the term consequences, paragraph 3(b) specifically excludes from consideration as "significant restrictions upon subsistence uses" all non-physical human ramifications. That is, any direct or indirect effects upon the culture or social structures of the St. Lawrence Island Native communities are considered by the Agreement to be irrelevant or trivial.

11. Furthermore, paragraph 5 states that any awards to Island residents as a result of subsistence harvest reductions will be paid in cash, rather than in kind. While at-

tempts have been made to place dollar values on subsistence resources (*see e.g.*, R. Wolfe, *Norton Sound/Yukon Delta Sociocultural Systems Baseline Analysis,* Alaska OCS Socioeconomic Studies Program, Technical Report No. 72 (October 1981)), such attempts are necessarily based upon assumptions unique to a capitalist economy, not necessarily upon scientific criterion. The Agreement thus reflects an extreme cultural bias, one that favors the ideological and economic structure of the dominant segment of American society. In a society such as that found on St. Lawrence Island, cash repayment for the loss of naturally recurring resource species will not be viewed by most residents as even a rough equivalence. From their point of view, it is impossible to conceive of such an equivalence. Money simply cannot replace the subsistence resource base. Money can ease the pain of physical hunger, but not cultural stress, or psychological pain. (In conversations this past week with Gambell residents a good deal of black humor was directed at the prospect of replacing the subsistence resource base with food stamps or MacDonald's restaurants. It was suggested that perhaps the food stamps could be made in the shape of walrus so that they would truly replace Native foods).

12. The Hold Harmless Agreement, while consistent with the prevailing worldview of contemporary American society, is at odds with the cultural preferences of Island Eskimos. From their perspective, it is impossible for them to be "Held Harmless." Even if the restrictive interpretation of the consequences of off-shore oil/gas activities is ignored, and it must not be ignored, the Agreement gives only the illusion of protecting Native interests. It is a unilateral declaration, not a bilateral agreement. It protects only the financial interests of the energy firms, protecting neither the subsistence economy nor the cultural interests of St. Lawrence Islanders.

13. The restrictions of paragraph 3(b) cannot, as already noted, be ignored. While the effects of hunger which would result from harvest disruptions must not be underestimated, neither can the cultural consequences of harvest disruptions be trivialized. Just as American society is organized around our economy, St. Lawrence Island society is organized around their subsistence economy. However, insofar as Native culture makes no meaningful distinction between economic and other activities, disruptions to the subsistence collection system have consequences far beyond what might be observed in non-Native society. Whereas participants in the dominant society frequently compartmentalize their lives into work and play categories, frequently working only in order to purchase recreational time, the holistic worldview of these Yup'ik speakers provides for no such compartmentalization (*see generally* Little and Robbins (1984)). Work and play are integrated and occupational colleagues, and same-sex friends and relatives are, for the most part, the same people.

14. While these Yup'ik-speaking Eskimos organize their activities around hunting, gathering, processing and distributing subsistence resources, the patriclan provides the organizing principle. Patriclans are non-local kin groups in which descent is determined through the male line. Inmarrying females are incorporated into the patriclan, while giving up membership in the clans of their birth. The eldest member of the clan, male or female, assumes leadership of the patriclan and provides advice on a wide range of issues from marriages, the naming of children and dispute resolution, to the determination of hunting practices and major purchase of subsistence equipment. With few exceptions hunting, fishing and gathering crews are organized around clan affiliations. Segments of the patriclans work and play together with great frequency as subsistence crews. Most generally these subsistence crews are

comprised of brothers and their own sons and/or nephews, i.e. clan segments. Summer fishing and gathering crews also include wives, daughters and nieces.

15. Disruptions in the availability and/or harvest of subsistence resources would alter these social structures in significant ways. As used here social structures refer to patterned behaviors, that is, repetitive behaviors among and between individuals. To the extent that harvests are disrupted, so are the associated behaviors. In less extreme cases, even though hunting activities may increase as crews attempt to equal past harvests in the face of a reduced resource base, the sharing network which is extensive and includes all Native residents of both Gambell and Savoonga would be altered. With less to share, there would be less sharing. As the reduction in sharing continued there would be deterioration in the network (*see* R. Little, and L. Robbins, *The Yup'ik Eskimos of St. Lawrence Island, Alaska: A Social Impact Assessment of Proposed Energy Development,* Chapter 8 in P. Savatsky (ed.), Social Impact Assessment Series, Westview Press, Summer 1985, for a more complete discussion of this process).

16. The longer and/or more extreme the disruption, the more devastating the results. As subsistence activities produce less and less, cash and credit resources are utilized to purchase foods to replace subsistence foods. While non-Native foods are consumed on St. Lawrence Island, there is an obvious preference for Native foods. Even the eating patterns are different when non-Native foods are consumed. Sitting around a common food tray on the floor is a pattern reserved only for eating Native foods.

17. As the reasons for interacting with other members of subsistence crews decrease as a result of disruptions, so do the number of interactions. With the latter comes an erosion of the social system. Furthermore, as cash and credit reserves dwindle, decisions to hunt may become less numerous for both psychological and financial reasons.

Regarding the former, learning theory would lead us to predict that decreased hunting successes leads to fewer decisions to hunt. In regard to the latter, money for gas and other supplies may not be available. Ultimately, a choice must be made: to hunt or purchase food from local stores (assuming that such food is even available).

18. In the most extreme instance of harvest disruptions resulting from off-shore oil/gas activities in the Bering Sea, an extended and extreme disruption, there would be a breakdown of the entire social system. In such an event, a vital culture would be lost as subsistence activities ceased to be replaced by welfare payments or out-migration to the mainland. The creation of a healthy cash economy on the Island in the absence of a resource base is a most unlikely event.

19. Because of the potential severity of harvest disruptions, the extended consequences of off-shore oil/gas activities cannot be ignored. The social consequences of energy development in the Bering Sea are at least equal in importance to the simple and direct physical consequences. But, like the physical consequences, it is conceptually impossible to create a "Hold Harmless Agreement." How does one compensate a people for the loss of a social system or an entire culture?

20. The Agreement, as it now stands, protects only the energy firms, even if the focus of the agreement is restricted to the direct physical impacts of harvest disruptions. If the equally important social and cultural consequences of harvest disruptions are considered, the Agreement is totally inadequate to the task of protecting a Native people and a way of life, a way of life that has continued uninterrupted since at least the time of Christ. *See* Little and Robbins, (1984). For these reasons, it is my expert opinion that the "Hold Harmless Agreement" filed with this court is completely inadequate and does not protect the Native people of St. Lawrence Island from pos-

sible adverse consequences resulting from exploration of the leases in Norton Sound and the Navarin Basin. Nor, given the particularities of Native life in and around the Bering Sea, can I contemplate any agreement which could effectively protect these people from the adverse consequences of oil and gas activities.

/s/ RONALD L. LITTLE
Ronald L. Little

SUBSCRIBED AND SWORN TO before me this 14 day of June, 1985.

DONALD COOPER
Notary Public in and for the
State of Alaska
My commission expires: 4/13/88

In the Supreme Court of the United States

No. 85-1239

AMOCO PRODUCTION COMPANY, ET AL., PETITIONERS

v.

VILLAGE OF GAMBELL, ALASKA, ET AL.

ORDER ALLOWING CERTIORARI. Filed June 2, 1986.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. This case is consolidated with 85-1406, *Donald P. Hodel, Secretary of the Interior, et al.* v. *Village of Gambell, et al.*, and a total of one hour is allotted for oral argument.

In the Supreme Court of the United States

No. 85-1406

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

VILLAGE OF GAMBELL, ET AL.

ORDER ALLOWING CERTIORARI. Filed June 2, 1986.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. This case is consolidated with 85-1239, *Amoco Production Company, et al.* v. *Village of Gambell, Alaska, et al.*, and a total of one hour is allotted for oral argument.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erroneously ruled that a district court must, except in unusual circumstances, enter a preliminary injunction whenever it finds a likely violation of a procedural requirement of an environmental statute.

2. Whether Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3120, which requires federal land managers to determine whether proposed dispositions of public lands in Alaska "would significantly restrict subsistence uses" and, if so, to follow certain procedures and make certain findings prior to any such disposition, applies to the outer continental shelf (OCS), when the Act defines "public lands" as lands which are "in Alaska" and "the title to which is in the United States."

3. Whether, even if Section 810 applies to the OCS, neither OCS leasing nor exploration may proceed until the Secretary of the Interior complies with Section 810's procedural requirements for all stages of the OCS program, including development and production.

4. Whether a construction that ANILCA applies to the OCS should be given retroactive effect, thereby casting a cloud over more than 600 previously issued OCS leases and $4.2 billion in bonus bids received by the Treasury for those leases.

PARTIES TO THE PROCEEDING

The petitioners in No. 85-1406 are Donald P. Hodel, Secretary of the Interior, and the United States Department of the Interior. The petitioners in No. 85-1239 are Amoco Production Company, ARCO Alaska, Inc., Exxon Corporation, Mobil Exploration & Producing Services, Inc., Sohio Alaska Petroleum Company, Shell Western E & P, Inc., Texaco, Inc., Union Oil Company of California. The respondents are People of the Village of Gambell, People of the Village of Stebbins, and Nunam Kitlutsisti.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

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v.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a)[1] is reported at 774 F.2d 1414. The opinion of the district court (Pet. App. 35a-43a) is unreported. An earlier opinion of the court of appeals in this case (*Gambell I*) (Pet. App. 44a-65a) is reported at 746 F.2d 572. An earlier opinion of the district court (Pet. App. 68a-69a) is unreported.

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[1] Pet. App. references are to the appendix to the petition in No. 85-1406.

JURISDICTION

The judgment of the court of appeals (Pet. App. 79a-80a) was entered on October 25, 1985. On January 13, 1986, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including February 22, 1986. The petition was filed on February 21, 1986, and was granted on June 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Pertinent provisions of the Alaska National Interest Lands Conservation Act (ANILCA) are reproduced at Pet. App. 116a-122a.

STATEMENT

This case concerns exploratory drilling by lessees of the federal government in two outer continental shelf (OCS) leasing areas in the Bering Sea: Norton Sound (Lease Sale 57) and the Navarin Basin (Lease Sale 83). In 1984, the court of appeals ruled that Section 810 of ANILCA, 16 U.S.C. 3120, applies to the OCS in Norton Sound, and remanded for further proceedings. The district court subsequently denied respondents' request for a preliminary injunction against exploratory operations in Norton Sound, which had been consolidated with a similar request involving such operations in the Navarin Basin. A divided panel of the court of appeals reversed the district court on the ground that respondents' showing of a likelihood of success on their claim that the Secretary of the Interior violated Section 810 required the issuance of an injunction, notwithstanding the countervailing equities and public interest considerations that led the district court to deny injunctive relief.

1. *Title VIII of ANILCA and OCS Leasing.* Congress enacted ANILCA, 16 U.S.C. 3101 *et seq.*, on December 2, 1980, to preserve for future generations "certain lands and waters in the State of Alaska that contain nationally

significant natural, scenic, historic, archaeological, geological, scientific, wilderness, cultural, recreational, and wildlife values" (16 U.S.C. 3101(a)). To that end, ANILCA established "conservation system unit[s]" (16 U.S.C. 3102(4)). Additionally, ANILCA is intended to "provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so," as long as that opportunity is provided in a manner consistent with "the purposes for which each conservation system unit is established" (16 U.S.C. 3101(c)).

Title VIII of ANILCA, 16 U.S.C. 3111-3126, creates a framework for protecting "subsistence uses" [2] by rural Alaskans. Section 804, 16 U.S.C. 3114, provides that "subsistence uses shall be accorded priority over the taking on such [public] lands of fish and wildlife for other purposes." Section 805(a)(1) creates a mechanism for administering the preference, directing the Secretary of the Interior to create at least six "subsistence resource regions" which together encompass "all public land" (16 U.S.C. 3115(a)(1)). Within each region the Secretary is to establish an advisory council and, "as he finds necessary," other local advisory committees, in order to receive the expertise of local residents on subsistence issues (16 U.S.C. 3115(a)(2) and (3)). Section 805(d) directs the Secretary not to implement Section 805(a) through (c) if the State "enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, Sections 803, 804, and 805" (16 U.S.C. 3115(d)). The Secretary has acknowledged that the

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[2] "Subsistence uses" mean "the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade" (16 U.S.C. 3113).

State's laws meet the requirements of Section 805(d). See, generally, Alaska Stat. §§ 16.05.010-16.05.950 (1983 & Supp. 1984).

Section 810 provides that a federal agency must follow certain procedures "[i]n determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands" (16 U.S.C. 3120). The federal agency having "primary jurisdiction" over the relevant public land must first evaluate three factors: the effect of the action on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and alternatives which would "reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes" (*ibid.*). If the action "would significantly restrict subsistence uses," the federal agency must notify the appropriate state agency, as well as any appropriate regional councils and local committees (*ibid.*). The federal agency then must hold a hearing in the vicinity of the area involved, and make three findings (16 U.S.C. 3120(a)(3)):

> that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

2. *The challenge to Lease Sale 57 (Norton Sound).* Lease Sale 57, which took place in March 1983, was preceded by intensive study of possible environmental impacts, including impacts on subsistence uses. The environmental impact statement (EIS) for Lease Sale 57 gave considerable attention to possible impacts on subsistence uses (EIS 47-55, 136-148, 204, 206, 211-213, 223-224, 291-296) and concluded that significant disruption of subsistence uses from all phases of OCS operations

was "unlikely" (*id.* at 142).[3] However, the Department did not follow the specific procedures of Section 810 of ANILCA because it was of the view that ANILCA did not apply to the OCS.

Respondents, the native villages of Gambell and Stebbins, filed a complaint on March 4, 1983, seeking injunctive relief against Lease Sale 57. The complaint charged that the Secretary had failed to comply with Section 810 and that the sale conflicted with the villagers' alleged aboriginal rights to the OCS. The district court denied the villages' motion for a preliminary injunction, and the sale was held on March 15, 1983. On April 4, 1983, the district court denied the villages' motion for summary judgment. It ruled that the meaning of the phrase "public lands"—" 'land situated *in Alaska*' to which the United States holds title" (Pet. App. 68a (emphasis in original))—is "clear." Rejecting "plaintiffs' attempts to manufacture an ambiguity," the court concluded that there is "no persuasive evidence that Congress intended the phrase 'public lands', as used in § 810(a), should include offshore lands and waters outside the territorial boundaries of Alaska" (*id.* at 69a). The court also held that the villagers have no aboriginal rights to the OCS (*ibid.*; see *Inupiat Community of the Arctic Slope* v. *United States*, 548 F. Supp. 182, 186 (D. Alaska 1982), aff'd on other grounds, 746 F.2d 570 (9th Cir. 1984), cert. denied, No. 84-1801 (Oct. 7, 1985)). Based on these rulings, the district court granted summary judgment in favor of the government and the intervenor oil companies (*ibid.*). The villages appealed and moved in the Ninth Circuit to enjoin the issuance of leases pending appeal. That motion was denied by a panel of the court of appeals on May 10, 1983. On that same day, 59 tracts were leased for bonus payments totaling $317,873,372 (Minerals Management Service, *Federal Offshore Statistics* 13 (1984)).

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[3] The final EIS for Lease Sale 57 is part of the record in this case, but has not been reproduced in the joint appendix due to its length. A copy of the EIS has been lodged with the Clerk.

3. *Approval of exploration plans for Norton Sound.* Subsequent to the district court's ruling, but prior to the court of appeals' decision on the merits of the appeal, intervenors Exxon and ARCO (among the petitioners in No. 85-1239) submitted exploration plans covering a number of the tracts in Norton Sound on which they had received leases. Exploration is the third of the "four distinct statutory stages to developing an offshore oil well" created by the 1978 amendments to the Outer Continental Shelf Lands Act of 1953 (OCSLA), 43 U.S.C. 1331 *et seq.* *Secretary of the Interior* v. *California*, 464 U.S. 312, 337 (1984).[4] Exploration may proceed only after the lessees demonstrate compliance with any applicable state management program under the Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.* The Secretary approved Exxon's exploration plan on December 28, 1983, and ARCO's plan on March 19, 1984. Neither respondents nor anyone else challenged the Secretary's approval of the exploration plans within the 60-day period provided by 43 U.S.C. 1349(c). Accordingly, exploration proceeded in Norton Sound during the summer of 1984 with the drilling of several wells (see, *e.g.*, J.A. 26).

4. *The court of appeals' decision in Gambell I.* On appeal, the court of appeals reversed the district court's ruling on Section 810 and affirmed its ruling on the aboriginal claims on other grounds (*Gambell I*, Pet. App. 44a-65a). The court first addressed the aboriginal claim by "assum[ing] rather than deciding that appellants had an aboriginal right to hunt and fish in the waters of Norton Sound above the lands involved in the lease-sale" (*id.* at 45a n.1). The court concluded that these rights had been extinguished by the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1603(b) (Pet. App. 46a-57a).

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[4] The four stages of the OCS process are: (1) planning a five-year nationwide leasing program (43 U.S.C. 1344); (2) conducting a lease sale (43 U.S.C. 1337(a)); (3) exploration (43 U.S.C. 1340); and (4) development and production (43 U.S.C. 1351).

The court next turned to Section 810, reviewing first the legislative history of ANILCA to determine whether the phrase "public lands" was intended to apply to the OCS. Relying on several instances where legislators appeared to refer to the OCS as being "in Alaska" (Pet. App. 58a) and noting that ANCSA and Title VIII of ANILCA "are clearly related," the court found it a "reasonable assumption that Congress intended the preference and procedural protections for subsistence uses mandated by Title VIII of [ANILCA] to be co-extensive with the extinguishment of aboriginal rights that made those measures necessary" (*id.* at 59a). The court also found "compelling" that Title VIII of ANILCA "was adopted to benefit the Natives" and on that basis chose to resolve any "ambiguit[y]" in the statute in their favor (*id.* at 62a-63a). Accordingly, the court ruled that the phrase "public lands" included "outer continental shelf lands and waters contiguous to the State of Alaska" (*id.* at 58a).

The court of appeals did not reach the question whether Interior had substantially complied with Section 810 in the course of complying with other environmental statutes or, if not, whether the Sale 57 leases should be voided. Instead, the court remanded the case to the district court for a determination of those issues and the framing of an appropriate remedy (Pet. App. 65a).

5. *Interior's post-Gambell I subsistence evaluation for Lease Sale 57.* In accordance with the court of appeals' decision in *Gambell I*, Interior began to integrate the requirements of Section 810 into its Alaska OCS leasing program. With respect to Lease Sale 57, Interior determined to reevaluate subsistence issues, including those already studied in the EIS for the sale. Interior's post-sale Section 810 evaluation was issued on April 22, 1985 (Pet. App. 81a-106a). The evaluation document followed the stage-by-stage approach set out in the OCSLA (see note 4, *supra*) (id. at 84a). The evaluation document nonetheless analyzed, to the extent feasible, possible im-

pacts that might arise at those future stages of the OCS process (*ibid.*).

The evaluation document found that the execution of leases (which permits lessees to conduct only limited preliminary activities on the OCS) had not and would not significantly restrict subsistence uses (Pet. App. 103a). The evaluation document further found that the exploration stage activities that had occurred in Norton Sound to date had not significantly restricted subsistence uses and were not likely to do so in the future (*id.* at 103a, 106a). The evaluation document noted that a separate Section 810 evaluation would be performed for each subsequent exploration plan submitted for the Secretary's approval (Pet. App. 85a). Finally, the evaluation document found that, if development and production activities were ever conducted in the Lease Sales 57 area, which was not likely, they might, in the event of a major oil spill, significantly restrict subsistence uses for limited periods in limited areas (*id.* at 92a-99a).[5] The evaluation document stressed that more definitive judgments could be made only if and when a particular development and production plan were submitted for approval and that a separate Section 810 evaluation would be prepared at that time (Pet. App. 85a).

6. *Lease Sale 83 (Navarin Basin).* Lease Sale 83 was conducted on April 17, 1984, without litigation challenge, and resulted in the leasing of 163 tracts for total bonus payments of $516,317,331 (Minerals Management Service, *Federal Offshore Statistics* 15 (1982)). The Basin is so far from land—more than 250 miles from the nearest inhabited land (St. Lawrence Island) and more than 350 miles from the mainland—that no Native subsistence harvesting occurs there. Nevertheless, the possible subsistence effects of Lease Sale 83 were examined in the lease sale EIS (EIS III-60 to III-75, IV-20 to IV-68,

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[5] To this extent, the findings differed from those of the EIS discussed on pages 4-5, *supra*.

IV-81 to IV-90, IV-106, IV-112) and found to be negligible (*id.* at IV-83 to IV-84).[6]

Interior approved exploration plans for the Navarin Basin on December 28, 1984 (Exxon), January 23, 1985 (ARCO), and April 19, 1985 (Amoco). These approvals were made after the court of appeals' ruling in *Gambell I* and accordingly contained explicit Section 810 evaluations. See, *e.g.*, Pet. App. 107a-115a (Section 810 evaluation for Exxon's exploration plan). No challenges to these approvals were brought within the 60-day period provided in 43 U.S.C. 1349(c)(3)(C). In reliance on the approvals, the three companies proceeded to commit more than $60 million in preparation for the 1985 drilling season (J.A. 35-52).

7. *Proceedings on remand in the district court.* On April 3, 1985, the villages returned to the district court seeking a preliminary injunction against exploratory activities in the Lease Sale 57 area. By that time, intervenor Exxon had committed more than $10 million toward the drilling of two exploratory wells in Norton Sound during the ice-free months of 1985 (J.A. 30-34).

On April 23, 1985, more than a year after Lease Sale 83 had been held, respondent Village of Gambell, joined by respondent Nunam Kitlutsisti, an organization of Yukon Delta Natives, filed a complaint seeking to void Lease Sale 83 and enjoin imminent exploratory drilling in the Navarin Basin. The Lease Sale 83 complaint, like that in the Lease Sale 57 litigation, alleged violations of Section 810 and also added a claim that the Secretary, by conducting the lease sale, had breached trust duties owed to the Natives.

After consolidating the requests for preliminary injunctions in the Lease Sale 57 and Lease Sale 83 cases, the district court denied the motions on May 23, 1985 (Pet. App. 35a-43a). The court found that respondents

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[6] A copy of the Lease Sale 83 final EIS has been lodged with the Clerk (see note 3, *supra*).

had "established a strong likelihood of success on the merits" (*id.* at 43a). Specifically, the court reasoned that even though the Secretary's environmental impact statements for both lease sales had included the type of evaluation of subsistence impacts called for by Section 810, those evaluations were necessarily deficient because the Secretary "did not have the policy precepts of ANILCA in mind at the time of evaluation" (Pet. App. 37a-38a). The court went on to examine Interior's post-sale ANILCA compliance document for Lease Sale 57 (see pages 7-8, *supra*). The court did not question that this document adequately evaluated the effects of leasing on subsistence uses, nor did it question Interior's conclusion that neither the leasing nor the exploration stage of the OCS process would significantly restrict subsistence uses. However, the court concluded that the notice, hearing, and findings requirements of Section 810(a)(1)-(3) should have been followed, in light of Interior's determination that a significant restriction on subsistence uses might occur at the development and production stage, should that stage ever be reached (Pet. App. 40a-41a).

The district court nevertheless concluded that the equities weighed against the issuance of an injunction prohibiting continued exploratory activities. First, the OCSLA gives the Secretary continuing power to control and shape the offshore leasing process; hence, if compliance with the requirements of Section 810 reveals a need to alter leasing conditions or configurations, the Secretary retains the power to do so (Pet. App. 43a). Second, it was apparent that the only activity planned at this time, exploration, would not significantly restrict subsistence uses (*ibid.*). Third, the national interest in expedited OCS exploration declared in 43 U.S.C. 1332(3) might be frustrated by an injunction (Pet. App. 43a).

8. *The court of appeals' decision in Gambell II.* Respondents appealed from the district court's denial of injunctive relief and sought an emergency injunction against the ongoing exploratory drilling in the two lease

sale areas. On June 6, 1985, a panel of the court of appeals denied the motion, but directed the Secretary, in conjunction with the intervenor oil companies, to file a "hold harmless agreement that will protect [the villages] from any consequences resulting from significant restrictions upon subsistence uses by [the villages] of their lands" (Pet. App. 70a). A hold harmless agreement was submitted to the court of appeals on June 13, 1985 (*id.* at 72a-76a) and approved by the court, with minor revisions, on June 21, 1985 (*id.* at 77a-78a).

Exploratory drilling proceeded without incident in both lease sale areas throughout the summer and fall of 1985. On October 25, 1985, a divided panel of the court of appeals reversed the district court's denial of preliminary injunctive relief (*Gambell II*, Pet. App. 1a-34a). The court of appeals affirmed the district court's ruling that the villages had established a strong likelihood of success on the merits, agreeing with the lower court that the Secretary could not have substantially complied with Section 810 of ANILCA because he did not have its mandate "clearly in mind" when he decided to conduct the lease sales (Pet. App. 8a-12a).[7] Turning to the post-sale Section 810 evaluation for Lease Sale 57 (see pages 7-8, *supra*), the court of appeals agreed with the district court that Interior's finding that development and production activities, if they ever occur, "may significantly restrict subsistence uses in certain areas" (Pet. App. 85a) required the Secretary to conduct the hearing and make the findings required by Section 810(a)(1)-(3) prior to conducting the lease sales. The court dis-

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[7] Inexplicably, the court of appeals stated (Pet. App. 9a) that "in determining whether to approve Lease Sale 57 or Lease Sale 83, the Secretary did not evaluate the effect of such leases on subsistence uses and needs of the Native Alaskans," even though the district court had found the opposite, relying on a record that clearly showed that the Secretary had performed detailed subsistence evaluations in the environmental impact statements prepared for the two sales (*id.* at 37a, 41a-42a).

tinguished *Secretary of the Interior* v. *California*, on the ground that the decision did not deal with ANILCA (Pet. App. 13a).

The court of appeals next held that the equitable considerations relied upon by the district court in denying a preliminary injunction did not "excuse its duty to issue an injunction in light of its determination that there was a strong likelihood that the Villages would prevail [on the merits]" (Pet. App. 15a). The court of appeals did not disagree with the district court's finding that "exploration will not significantly restrict subsistence resources" (*ibid.*). Instead, the court ruled that "'[i]rreparable damage is presumed'" whenever an agency has failed to comply with "a substantive procedural [requirement] of an environmental statute" (*ibid.*, quoting *Save Our Ecosystems* v. *Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984)) and, accordingly, an injunction is required except in "unusual circumstances" (Pet. App. 15a, 19a). The court of appeals limited "unusual circumstances" to where enjoining a project from proceeding in likely violation of an environmental statute would cause more environmental harm than good (*id.* at 17a) or would interfere with certain types of long-term contracts (*id.* at 16a, 19a). In this case, the court of appeals held that the district court erred in finding "unusual circumstances" based on either the harm an injunction would cause to the national interest in expedited OCS development or the ability of the Secretary to alter the configuration of OCS activities if ANILCA subsistence studies show that to be necessary at any future stage of exploration or development (*id.* at 16a, 19a, 20a).

The court of appeals rejected the district court's findings with respect to the public interest, which were bottomed on the policy declared by Congress in the OCSLA to expedite exploration of the OCS. The court concluded that ANILCA effectively superseded this congressional policy (Pet. App. 20a-21a). Finally, the court rejected arguments that it was improper to apply *Gambell I* retro-

actively to Lease Sale 83 (*id.* at 22a-25a) and that the respondents' challenge to Lease Sale 83 was barred by laches (*id.* at 25a-26a).

District Judge Dimmick, sitting by designation, dissented (Pet. App. 28a-34a). Judge Dimmick noted that the government and the oil company intervenors "presented the trial court with substantial evidence showing that it was highly unlikely that exploratory activities would adversely affect subsistence resources," as well as evidence that the oil companies would have lost up to $70 million if the preliminary injunction had been granted (*id.* at 30a). In contrast, the villages had presented only evidence of "speculative harm" (*ibid.*). The dissent asserted (*id.* at 29a) that the majority's "rigid approach to the issuance of an injunction" was contrary to *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). The dissent also disagreed (Pet. App. 31a-32a) with the majority's retroactive application of *Gambell I* to Lease Sale 83.

SUMMARY OF ARGUMENT

I

Under traditional principles of equity, a mere showing that a statute has been or likely has been violated is not sufficient to require the extraordinary remedy of injunctive relief. The court must also determine whether injunctive relief is necessary to avoid irreparable injury to the party seeking that relief and consider the harm to others, as well as the public consequences, that such relief would entail. Applying these principles in this case, the district court properly denied respondents' request for a preliminary injunction on the ground that both the balance of irreparable harm and the public interest counseled against injunctive relief.

The court of appeals reversed on the erroneous ground that federal district courts lack their traditional equitable discretion in the enforcement of the procedural require-

ments of environmental statutes, such as Section 810 of ANILCA. Specifically, the court held that district courts must, except in unusual circumstances, presume both that "irreparable harm" has resulted from a likely violation of an environmental procedural requirement and that the "public interest" elevates environmental values over other competing public concerns. Because neither of these limitations on the district courts' equity jurisdiction is rooted in clearly expressed congressional intent, their imposition is inconsistent with this Court's decision in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). Nowhere in ANILCA did Congress suggest that injunctive relief is invariably required to preserve the efficacy and policy objectives of the Section 810 procedures. Nor did Congress anywhere suggest that those policy objectives supersede all other public interest concerns relevant to an award of injunctive relief in a particular case.

The circumstances of this case underscore the inappropriateness of applying such unsupported generalizations. Injunctive relief is plainly not necessary in this case to preserve the meaningfulness of Section 810 procedures or to redress any irreparable injury to respondents' interests. If it is ultimately resolved that Interior violated Section 810, compliance may be achieved before the development and production stage, which is the only stage that poses even a potential threat of a significant restriction on subsistence uses. Accordingly, because no significant restrictions were threatened absent an injunction, no public interest concerns favored the issuance of such relief. Concomitantly, the court of appeals' refusal to consider the weighty public interest considerations counselling against injunctive relief—particularly the express congressional goal of expedited exploration and development of the OCS—was without legal basis.

II

At all events, the relief in this case was predicated solely on the likelihood of a violation of a statutory requirement that is entirely inapplicable to the actions at

issue. Section 810 of ANILCA, 16 U.S.C. 3120, does not require a federal agency to evaluate the effects of every category of federal actions that might adversely affect subsistence resources. Section 810 concerns only effects on subsistence uses caused by proposed dispositions of "public lands," which ANILCA defines as lands that are both "situated in Alaska" and "the title to which is in the United States" (16 U.S.C. 3102(2) and (3)). The OCS meets neither statutory criterion. The OCS is, by definition, outside the boundaries of Alaska, and Congress has carefully and repeatedly declined to equate the federal government's interest in the OCS with the concept of title. Hence, dispositions of the OCS necessarily fall outside the scope of Section 810 even if they might affect subsistence resources.

Respondents' contrary view ignores the plain meaning of the statutory definition of "public lands" and mistakenly relies on isolated, casual remarks in the legislative debates and canons of statutory construction relevant only to the judicial construction of ambiguous statutory terms. In all events, ANILCA's legislative history and background and its statutory structure confirm that Congress did not intend to depart from traditional practice by including the OCS within "public lands." The clear consensus of the legislators, reflected throughout the Act's legislative history, was that its requirements would not extend beyond the state's boundaries and therefore would have no effect on oil and gas development on the OCS.

III

Even if Section 810 of ANILCA were thought to apply to the OCS, the court of appeals erred in rejecting the Secretary's post-sale compliance effort for Sale 57. In its Section 810 evaluation, Interior found that the lease sale stage of the OCS leasing process would not lead to significant subsistence restrictions; accordingly, the additional notice, hearing, and findings requirements of Section 810

were not followed. The Section 810 evaluation noted as well that if the development and production stage were reached, which was unlikely, a significant subsistence restriction might occur in certain localities. The court of appeals ruled that the mere threat of a significant restriction at the development and production stage triggered the notice, hearing, and findings requirement of Section 810(a)(1)-(3), 16 U.S.C. 3120(a)(1)-(3), at the leasing stage. This construction of Section 810 conflicts with its plain language and is inconsistent with this Court's decision in *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984).

In *Secretary of the Interior* v. *California*, this Court concluded that because the OCS leasing process consists of distinct stages, with each stage involving separate regulatory review and an additional transfer of rights to conduct activities on the OCS, the lease sale stage could not be deemed to have a "direct effect" on the coastal zone based on impacts potentially arising only at later stages. By its plain terms, Section 810 applies to each distinct stage separately; hence, as in *Secretary of the Interior* v. *California*, a lease sale should not be deemed to restrict significant subsistence resources based on restrictions potentially occurring (if at all) only at the development and production stage. To be sure, in performing a Section 810 evaluation for one stage, the agency may look to possible future stages, but for the purposes of determining whether the additional procedural requirements of Section 810 are triggered, the only relevant inquiry is whether the particular disposition of lands at issue—in this case the lease sale—"would significantly restrict subsistence uses" (16 U.S.C. 3120). In any event, because the Secretary found in this case that the development and production stage is not likely to occur at all, it is clear that the statutory standard that the proposed disposition "would significantly restrict subsistence uses" has not been met.

IV

Finally, even if this Court should agree with the court of appeals in *Gambell I* that Section 810 of ANILCA applies to the OCS, that construction should not, under this Court's criteria in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971), be applied retroactively to either Lease Sale 57 or Lease Sale 83. First, *Gambell I* declared a new principle of law, which differed from prior agency construction and the district court's construction. Second, retroactive application of *Gambell I* would further no policy objective of Section 810 because Interior consistently carried out substantial pre-leasing analyses of subsistence pursuant to NEPA. The Department of the Interior has announced, moreover, that it will not (if *Gambell I* is upheld) approve exploration or production plans without additional Section 810 reviews. Finally, the equities weigh strongly against retroactive application. Balanced against respondents' desire for a reevaluation of matters already thoroughly studied are the strong public interest in avoiding unnecessary disruptions to OCS development, as well as the enormous investments made by the oil companies pursuant to the lease sales.

ARGUMENT

I. THE NINTH CIRCUIT RULE THAT SECTION 810 OF ANILCA AND COMPARABLE ENVIRONMENTAL PROCEDURAL REQUIREMENTS DENY FEDERAL DISTRICT COURTS TRADITIONAL EQUITABLE DISCRETION WITH RESPECT TO THE ISSUANCE OF INJUNCTIVE RELIEF IS CONTRARY TO THIS COURT'S DECISION IN *WEINBERGER* V. *ROMERO-BARCELO*, 456 U.S. 305 (1982)

The court of appeals' ruling that the district court abused its discretion in denying respondents' motion for a preliminary injunction is inconsistent with this Court's decision in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). The district court denied that motion on the

grounds that "[t]he balance of irreparable harm does *not* favor the [respondents]" and that "[t]he public interest favors continued oil exploration" (Pet. App. 43a (emphasis in original)). The court stressed that "delay in the exploration of the OCS may cause irreparable harm to this nation's quest for new oil resources and energy independence," contrary to explicit congressional policy (see 43 U.S.C. 1332(3)), and that "exploration will not significantly restrict subsistence resources" (Pet. App. 43a). In reversing, the court of appeals disputed the district court's characterization of the "public interest" (*id.* at 19a-21a), but did not disturb its finding that an injunction was not necessary to prevent irreparable harm to respondents' interests.[8] Instead, the appellate court purported to distinguish *Romero-Barcelo*, in which this Court stressed that "the basis for injunctive relief in the federal courts has always [included] irreparable injury" and upheld a district court's refusal to follow a different

[8] In an attempt to deny the court of appeals' express rationale, respondents (Br. in Opp. 26) and the State of California as amicus curiae (Br. 4) seize upon the court's isolated statement that "[t]he by-products of oil and gas exploration such as potential oil spills, leakage, and noise pose the threat of disruption to subsistence economy sufficient to destroy irreparably the isolated and unique culture of the Native Alaskans" (Pet. App. 21a (citing R. Little & L. Robbins, *Technical Report No. 89, Effects of Renewable Resource Harvest Disruptions on Socioeconomic and Sociocultural Systems: St. Lawrence Island* 330-374 (1984))). The court of appeals, however, clearly did not base its ruling on any such unsupported factual finding. The Department of the Interior in this case made explicit findings, never challenged by respondents, that exploration would not significantly restrict subsistence resources in the two lease sale areas. Indeed, as the court of appeals recognized (Pet. App. 15a), the district court found that the injury Section 810 was intended to prevent—significant restrictions on subsistence uses—was highly unlikely to result from exploration stage activities (Pet. App. 43a). The court of appeals did not overturn this finding as clearly erroneous (the record certainly would not have supported such action), but instead ruled that lack of harm did not qualify as an "unusual circumstance" excusing the mandatory issuance of an injunction (*id.* at 15a).

approach for violations of the Clean Water Act, 33 U.S.C. 1251 *et seq.* (456 U.S. at 312, 314-320). See Pet. App. 21a-23a n.2. In our view, *Romero-Barcelo* is controlling and, as in that case, the district court's denial of injunctive relief was proper.

1. In *Romero-Barcelo*, this Court thoroughly reviewed basic principles of equity jurisprudence in the federal courts and addressed, in particular, the application of those principles to violations of federal statutes, including federal environmental protection laws. Starting with the proposition that an injunction " 'is not a remedy which issues as of course' " (456 U.S. at 311 (quoting *Harrisonville* v. *W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-338 (1933)), the Court stated that the foundation for "injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies" (456 U.S. at 312). Moreover, consideration of the equities is essential: "Where plaintiff and defendant present competing claims of injury, the traditional function of equity has been to arrive at a 'nice adjustment and reconciliation' between the competing claims" (*ibid.* (quoting *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944)). " 'The essence of equity jurisdiction,' " the Court stated, is " 'to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it' " (456 U.S. at 312). Finally, the Court admonished that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction" (*ibid.*).

These principles apply with special force to the issuance of preliminary injunctions. In the preliminary injunction context, the court will often not have had an opportunity to consider fully the merits of the case,[9] thereby making the sole justification for the exercise of equitable power the maintenance of the status quo pending completion of

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[9] While this may have been true of the district court in the present case, the court of appeals appears to have fully addressed the merits (see note 14, *infra*).

the litigation. Cf. *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 9-11 (1942). Accordingly, the plaintiff must demonstrate that, in the absence of a preliminary injunction, it will suffer actual and substantial injury that is truly irreparable, *i.e.*, incapable of remedy by relief ordered at the termination of the litigation. See *Sampson* v. *Murray*, 415 U.S. 61, 90 (1974). Moreover, the court must consider the injury to the defendant and the public interest that would be occasioned by the entry of even a temporary injunction. See, *e.g.*, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). In an appropriate case, irreparable damage to the public interest will justify withholding preliminary relief even though the burden on the plaintiff is substantial. *Yakus* v. *United States*, 321 U.S. 414, 440-441 (1944).[10]

In this case (and in those prior decisions upon which the court of appeals relied), the Ninth Circuit rejected these well established principles and applied a rule that, in effect, requires a district court to enter the injunction requested by the plaintiffs whenever it finds a violation, or probable violation, of a "substantive procedural" [11] requirement of an environmental statute (Pet. App. 14a-

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[10] Taken together, these considerations constitute the familiar four-part test that traditionally has governed the issuance of preliminary injunctions, stays, and other forms of temporary equitable relief in the federal courts. See, *e.g.*, *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). In *Virginia Petroleum Jobbers*, 259 F.2d at 925, the court articulated the test as follows: (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits; (2) whether the moving party has shown that without such relief, it will be irreparably injured; (3) whether the issuance of a stay would substantially harm other parties; and (4) whether injunctive relief would be in the public interest.

[11] Although the court below stated that "[a]n injunction is the appropriate remedy for a substantive procedural violation of an environmental statute" (citing *Thomas* v. *Peterson*, 753 F.2d 754, 764 (9th Cir. 1985)), the court's opinion in *Thomas* actually referred to "a *substantial* procedural violation" (*ibid.* (emphasis added)). Whether the discrepancy was deliberate or unintended does not

19a).[12] That rigid approach to injunctive relief in environmental suits cannot be reconciled with *Romero-Barcelo*. For, without basis in expressed congressional intent, it sharply curtails, if not eliminates altogether, the traditional authority of federal courts to consider the equities of awarding injunctive relief in a particular case.

This Court made plain in *Romero-Barcelo* that while "Congress may intervene and guide or control the exercise of the courts' [equitable] discretion, * * * we do not lightly assume that Congress has intended to depart from established principles" (456 U.S. at 313 (citations omitted)). "'[C]omprehensiveness of * * * equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.'" *Ibid.* (quoting *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); see also 456 U.S. at 322 (Stevens, J., dissenting)) ("Unless Congress specifically commands a particular form of relief, the question of remedy remains subject to a court's equitable discretion."). The "purpose and language of the statute under consideration * * *, not the bare fact of a statutory violation," determine whether Congress took the extraordinary step of curtailing the courts' discretion in the exercise of their equitable jurisdiction (456 U.S. at 314).

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affect our submission that the court of appeals' analysis is inconsistent with *Romero-Barcelo*.

[12] As noted (see page 12, *supra*), the Ninth Circuit's rule admits of only two exceptions. Injunctive relief may be denied if such relief would itself cause irreparable harm to the environment or if such relief would interfere with certain types of long-term contracts (Pet. App. 16a, 19a). The contractual-interference exception is evidently quite narrow, because the court of appeals did not apply it in this case despite the fact that injunctive relief against exploratory operations interferes with the intervenor oil companies' right to explore pursuant to their contracts with the government and their approved exploration plans.

Hence, in *TVA* v. *Hill*, 437 U.S. 153 (1978), this Court held that a permanent injunction was required precisely because the statutory provision that was violated (Endangered Species Act, 16 U.S.C. 1536) amounted to a "flat ban" for which "only an injunction could vindicate [its] objects" (*Romero-Barcelo*, 456 U.S. at 314). By contrast, in *Romero-Barcelo* the Court held that in the Clean Water Act, 33 U.S.C. 1251 *et seq.*, Congress has not evinced in the language, structure of the Act, or its legislative history sufficient intent to "deny courts their traditional equitable discretion" (456 U.S. at 319). While the Clean Water Act plainly prohibits discharges into navigable waters absent a federal permit (see 33 U.S.C. 1311) and the Navy in that case had no permit, the Court concluded that accomplishment of the Act's objectives did not require the issuance of an injunction.

2. Here, as in *Romero-Barcelo*, there is no clear indication that Congress intended to deny federal district courts their traditional equitable discretion in enforcing Section 810 of ANILCA. Section 810's requirement that certain steps be taken prior to a proposed disposition of public lands that would significantly restrict subsistence uses does not address the distinct issue whether a district court must award certain relief when a violation or a likely violation of that requirement has been established. Indeed, the inherently procedural nature of Section 810 strongly suggests that Congress did not intend to deny the courts their traditional equitable discretion. By its very nature, a procedural requirement is ancillary to the substantive policy objectives of the statute and, hence, whether its violation requires the extraordinary remedy of injunctive relief should normally turn on the particular circumstances of the case. See *Romero-Barcelo*, 456 U.S. at 314 ("Respondents suggest that failure to enjoin the Navy will undermine the integrity of the permit process by allowing the statutory violation to continue. The integrity of the Nation's waters, however, not the permit process, is the purpose of the [Clean Water

Act]."). Similarly, here Congress stressed both that Section 810's requirements are "procedural" and that, once those requirements are satisfied, "the proposed action may proceed even though its effect may be adverse to subsistence uses" (S. Rep. 96-413, 96th Cong., 1st Sess. 234 (1979)).

The court of appeals' contrary analysis rests on two premises. The first is that "'[i]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action'" (Pet. App. 15a, quoting *Save Our Ecosystems* v. *Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984)). The second is that the "public interest" favors injunctive relief because the interests served by federal environmental procedural requirements, such as ANILCA, supersede all other interests that might be at stake in a particular case (see Pet. App. 19a-21a, 23a n.2; see also *Save Our Ecosystems*, 747 F.2d at 1250). The fundamental flaw in these premises is that neither is based on clear expression of congressional intent.[13] Their inappropriateness in the circumstances of this case, moreover, both exposes the dangers of such unsupported generalizations and underscores the importance of traditional case-by-case review.

a. First, while we fully agree that the possibility of irreparable harm must be a central focus of the judicial inquiry in environmental cases, there is no basis for presuming that such harm will invariably occur unless injunctive relief is provided to remedy a violation of an environmental statutory requirement, such as Section 810 of ANILCA. Where, as here, the moving party has made no showing of irreparable harm and the purpose of the requirement purportedly violated is largely to assess the environmental impact of the proposed governmental

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[13] While the Senate Report states that "until the requirements of * * * section [810] have been satisfied the proposed action may not proceed" (S. Rep. 96-413, *supra*, at 234), the statement is part of a single sentence that goes on to explain that a "proposed action may proceed even though its effect may be adverse to subsistence uses" (*ibid.*).

action (rather than flatly to prohibit it), the propriety of injunctive relief should turn on traditional considerations, including whether such relief is necessary to render compliance with the requirement meaningful. As other courts of appeals have properly recognized, an injunction to redress a violation of an environmental statute, particularly an environmental procedural requirement, is not always necessary to preserve the decisionmaker's opportunity to implement the statute in the manner intended by Congress. See, *e.g.*, *Alaska* v. *Andrus*, 580 F.2d 465, 485 (D.C. Cir.) (injunction against an ongoing project available only where necessary "to preserve for the relevant decisionmaker the full opportunity to choose among alternatives that is contemplated by [the National Environmental Policy Act (NEPA), 42 U.S.C. 4331 *et seq.*]"), vacated in part on other grounds as moot *sub nom. Western Oil & Gas Ass'n* v. *Alaska*, 439 U.S. 922 (1978); see also *Massachusetts* v. *Watt*, 716 F.2d 946, 952 (1st Cir. 1983); *Sierra Club* v. *Hennessy*, 695 F.2d 643, 648-649 (2d Cir. 1982).

Here, there is no reason to believe that additional exploratory drilling by the oil companies would have made future compliance with Section 810 meaningless either in fulfilling its procedural requirements or in accomplishing its policy objectives. If it is ultimately resolved that Interior violated Section 810, compliance may be effected before the production stage—the only stage that poses even a potential threat of a significant restriction on subsistence uses (see page 8, *supra*). Interior made explicit findings that exploration would not significantly restrict subsistence resources in the two lease sale areas (see Pet. App. 85a, 90a, 92a, 95a, 98a, 99a, 101a, 103a, 106a, 108a-115a), and those findings have neither been challenged by respondents nor questioned by the court below. Indeed, the district court explicitly found (*id.* at 43a) that the injury Section 810 was intended to prevent—significant restrictions on subsistence uses—was highly unlikely to result from explo-

ration activities, and that Interior possesses adequate continuing authority over the OCS development process to cure any statutory violation. An order directing Interior to comply with Section 810 would, therefore, be at least as effective as the order issued by the district court in *Romero-Barcelo*, which directed the Navy to apply for a discharge permit under the Clean Water Act (see 456 U.S. at 309-310).[14] As in *Romero-Barcelo*, injunctive relief is not automatically necessary. The court of appeals, however, gave no deference to the district court's findings, and undertook no particularized analysis regarding whether irreparable harm would result to the interests protected by the statute—the finding of probable statutory violations started and ended its inquiry.[15]

b. Similarly, the court of appeals' assumption that the "public interest" automatically favors an injunctive remedy for violations of environmental procedural

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[14] The court of appeals' attempt (Pet. App. 23a n.2) to distinguish *Romero-Barcelo* on the ground that it involved a permanent rather than a preliminary injunction is wholly unpersuasive. A district court should have greater, not less discretion in considering whether preliminary relief is appropriate. In all events, the distinction is unavailing here because the court of appeals addressed the merits of this case as if it were considering a permanent injunction; the court made definitive rulings (Pet. App. 9a-14a, 22a-26a) which it has subsequently treated as binding precedent. See *Tribal Village of Akutan* v. *Hodel*, 792 F.2d 1376 (9th Cir. 1986) (*reprinted in* U.S. Reply Memo App.).

[15] The asserted violations in this case were, moreover, plainly insubstantial. In the Sale 83 case, for example, the district court found that the Secretary had "considered the relevant factors" required by Section 810 and had not erred in finding that the lease sale and subsequent stages of the OCS process, including development and production, would have "negligible" or "nonexistent" impacts on subsistence uses (Pet. App. 41a-42a). Nevertheless, the diestrict court and the court of appeals found a violation of Section 810 solely because the Secretary made his subsistence findings pursuant to NEPA, rather than Section 810, and thus did not have the policy precepts of Section 810 "clearly in mind" (Pet. App. 8a, 38a).

statutes lacks the necessary supporting indicia of congressional intent and is rebutted by the circumstances of this case. Contrary to the reasoning of the court of appeals, ANILCA plainly does not evince an unambiguous congressional intent to "cho[ose] the protection of subsistence life over oil exploration" (Pet. App. 23a n.2). To be sure, Title VIII of ANILCA, including Section 810, was intended "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so" (16 U.S.C. 3101(c)). But the Act nowhere suggests that goal is to be achieved without compromise and no matter what the costs—indeed, as previously described (page 23, *supra*), quite the opposite is true (see S. Rep. 96-413, *supra*, at 234).[16]

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[16] The court of appeals' even broader presumption that Congress intended to elevate all environmental concerns over other competing national concerns is similarly flawed. This Court has rejected the notion that Congress intended generally to elevate environmental interests above other interests affected by a requested injunction. *Romero-Barcelo*, 456 U.S. at 316-319; see also *Aberdeen & Rockfish R. R.* v. *SCRAP*, 409 U.S. 1207, 1217-1218 (1972) (Burger, C.J., Circuit Justice) (recent environmental legislation, "however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of 'environmental damage' is asserted. * * * The decisional process for judges is one of balancing and it is often a most difficult task."); cf. *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 228 n.2 (1980) (NEPA does not require agency "to elevate environmental concerns over other, admittedly legitimate, considerations"). The Court in *Kleppe* v. *Sierra Club*, 427 U.S. 390, 407 (1976), for instance, stated that an injunction against coal mining ordered by the court of appeals in that case would have been erroneous even if that court's finding of a NEPA violation were correct because "in simple equitable terms there were no grounds for the injunction * * *" (427 U.S. at 407-408). In *Kleppe*, the district court had found that an injunction would have caused irreparable harm to the companies who sought to carry out their business ventures, and to the public who depended upon their operations, and the court of appeals had neither challenged that finding nor identified any imminent harm to the interests protected by NEPA (*ibid.*).

Because the court of appeals erroneously assumed that the "public interest" favored an injunction, that court failed to consider either Interior's and the district court's findings that significant subsistence restrictions were not at stake (see pages 8, 9, 10, *supra*) or the weighty countervailing public interest considerations counseling against injunctive relief in this case. Most fundamentally, as the district court found (Pet. App. 43a), enjoining exploratory activities threatens to cause irreparable harm to the congressionally mandated goal of expedited exploration and development of the OCS (see 43 U.S.C. 1802(1), 1802(9)). And, as the dissent below recognized (Pet. App. 30a), if the district court had enjoined exploratory activities at the outset of the 1985 season, as respondents had requested, such relief would have caused huge unrecoverable monetary losses to the intervenor oil companies, whose expenditures were made in reliance upon the Secretary's unchallenged approvals of their exploration plans. In sum, the application in this case of the court of appeals' preclusion of traditional equitable discretion has led to the entry of injunctive relief serving no substantial purpose other than to threaten irreparable harm to the public interest in expedited exploration and development of the OCS.

II. SECTION 810 OF ANILCA DOES NOT APPLY TO DISPOSITION OF AREAS OF THE OCS BECAUSE THEY ARE NOT "PUBLIC LANDS" WITHIN THE MEANING OF ANILCA

At all events, the relief in this case was predicated solely on the likelihood of violation of an environmental statutory requirement that is entirely inapplicable to the actions at issue. Section 810 of ANILCA requires a federal agency to evaluate the effect of its proposed disposition of "public lands" in Alaska on subsistence uses and needs (16 U.S.C. 3120). Its terms do not apply to any other federal actions that may affect subsistence uses and needs in Alaska. The only actions of the Secretary of the

Interior at issue in this case exclusively concern the OCS—which is *not* an area of "public lands" within the meaning of ANILCA. Respondents' contrary view, adopted by the court of appeals, ignores the plain meaning of the term "public lands," as expressly defined in ANILCA. Respondents' reliance on isolated, casual remarks in the legislative history and canons of statutory construction for ambiguous statutory terms, therefore, is misplaced; in all events, both the legislative history and the statutory structure of ANILCA confirm the view that the OCS lies outside Section 810's scope.

1. "[D]eference to the supremacy of the legislature, as well as recognition that congressmen typically vote on the language of a bill, generally require us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985) slip op. 10 (quoting *Richards* v. *United States*, 369 U.S. 1, 9 (1962)). In ANILCA, Congress carefully crafted a definition of "public lands" that leaves no room for an inference that Congress intended to include the OCS.[17] For the purposes of

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[17] Moreover, in traditional usage "public lands" refers only to onshore holdings of the federal government and does not include the OCS. See, *e.g.*, *Mann* v. *Tacoma Land Co.*, 153 U.S. 273, 284 (1894) (tidelands are not "public lands"); Public Land Law Review Commission, *One Third of the Nation's Land* 30 (1970) ("the mineral resources in the Outer Continental Shelf" do "not constitut[e] public land interests in the usual legal or lay definitions of public lands"); S. Rep. 1444, 88th Cong., 2d Sess. 10 (1964) (letter from Acting Secretary of the Interior, John A. Carver, Jr.) ("lands of the [OCS] are not public lands"); H.R. Rep. 1008, 88th Cong., 1st Sess. 14 (1963) (same); see also U.S. Dep't of Interior, *Public Land Statistics* 113 (1985) (excluding "lands located on the [OCS]" from definition of "public lands"). Hence, when Congress intends to include the OCS within the term "public lands" in a particular statutory context, Congress typically makes that intent explicit. See, *e.g.*, 43 U.S.C. 155 (defining "public lands" for purposes of withdrawal, reservation, or restriction for defense purposes as including the OCS); Pub. L. No. 88-606,

ANILCA, "public lands" is defined (with certain exceptions not relevant here) as "land[s] situated in Alaska which, after [the date of enactment of this Act], are Federal lands" (16 U.S.C. 3102(3)). "Federal land[s]" is defined as "lands the title to which is in the United States after [the date of enactment of this Act]" (16 U.S.C. 3102(2)). Since the OCS is not "situated in Alaska" and does not constitute "lands the title to which is in the United States," it falls outside the statute on either account.

First, the OCS is plainly not, by its very terms, "situated in Alaska." The OCS is "seaward and outside of the area of lands beneath navigable waters" granted to the states by the Submerged Lands Act, 43 U.S.C. 1311, which is that portion of the continental shelf lying within three miles from the state's coast line (see 43 U.S.C. 1312; 43 U.S.C. 1331(a)). Portions of the OCS, including areas involved in Lease Sale 83, are located as far as 350 miles from Alaska's borders. Alaska's seaward boundaries, like those of other coastal states, do not include the OCS because they extend only to those lands conveyed by the Submerged Lands Act (see Alaska Statehood Act, Pub. L. No. 85-508, § 6(m), 72 Stat. 343).

Second, the OCS is not "federal land" as defined by the Act. ANILCA's definition of "federal lands" reflects the traditional notion that public lands are only those in which the United States holds formal "title." During the last four decades, however, Congress has deliberately and repeatedly declined to equate the federal government's interest in the OCS with formal title. The United States asserts only "sovereign rights [over the OCS] for the purpose of exploring and exploiting its natural resources" (Convention on the Continental Shelf, *done* Apr. 29, 1958, art. 2, para. 1, 15 U.S.T. 471, T.I.A.S. No. 5578, 499

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§ 10, 78 Stat. 985 (defining "public lands" for purposes of public land law review commission study as including OCS mineral resources interests); see also H.R. Rep. 1008, *supra*, at 10.

U.N.T.S. 311);[18] it does not claim "title or ownership in the conventional sense" (*United States* v. *Louisiana*, 339 U.S. 699, 704 (1950); see also *United States* v. *Maine*, 420 U.S. 515, 517 (1975); *Treasure Salvors, Inc.* v. *Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 339-340 (5th Cir. 1978); see generally G. Coggins & C. Wilkinson, *Federal Public Land and Resources Law* 433-434 (1980) ("The various forms of jurisdiction and sovereignty that the United States has asserted over offshore areas do not amount to a claim of fee ownership of the underlying lands nor to an assumption of complete, exclusive jurisdiction over the waters.")).

Congressional enactments reflect this settled and carefully drawn characterization of the federal interest in the OCS. In the Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.*, Congress carefully distinguished the "title" to the seabed granted to the states from the "jurisdiction and control" over the OCS retained by the federal government. See 43 U.S.C. 1302, 1311(a)(1), 1314(a). In the Outer Continental Shelf Lands Act of 1953, enacted just a few months later, Congress similarly avoided a formal claim of title and instead declared that "the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition" (Act of Aug. 7, 1953, ch. 345, § 3(a), 67 Stat. 462).[19] More recently, in 1978

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[18] The phrase "sovereign rights," like the phrase "jurisdiction and control" in the Truman Proclamation (see note 19, *infra*), is intended to distinguish the limited rights in the continental shelf from sovereign territorial claims. M. McDougal & W. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* 696-699 (1962).

[19] The origins of this characterization of the federal interest in the OCS no doubt lie with the Truman Proclamation of Sept. 28, 1945, in which President Truman declared that the "natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States * * * appertain[] * * * to the United States, subject to its juris-

during its comprehensive overhaul of the 1953 OCS legislation, Congress specifically rejected a finding included in the House-passed bill that would have declared "that OCS lands and resources are public property held in trust" (see H.R. Conf. Rep. 95-1474, 95th Cong., 2d Sess. 75 (1978)) and retained the more limited characterization of the federal interest in the OCS propounded in 1953 (see 43 U.S.C. 1332(1); H.R. Rep. 95-1474, *supra*, at 79). Finally, the Report of the House Committee on Merchant Marine and Fisheries on the 1985 OCSLA amendments (included in the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, §§ 8001-8005, 100 Stat. 147-151) authoritatively reaffirms this consistent view:

> The term "public lands" enjoys two centuries of well-established meaning as it has been used by the U.S. Congress and interpreted by the Supreme Court. Two fundamental criteria determine whether or not a land area constitutes public lands; the holding of title to the area and the ability to sell or otherwise dispose of it.
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> * * * * *
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> The U.S. does not hold title to the OCS, nor is the OCS subject to "sale or other disposition under general laws." As opposed to full dominion and control the U.S. has claimed only limited sovereignty over the exploration and development of the natural resources on and within the OCS.

H.R. Rep. 99-300, 99th Cong., 1st Sess. 591 (1985).

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diction and control." Pres. Proclamation No. 2667, 3 C.F.R. 67 (1943-1948 comp.). In considering submerged lands legislation, Congress specifically noted that in its subsequent decision in *United States* v. *California*, 332 U.S. 19, 38-39 (1947), this Court, too, appeared to avoid the use of traditional ownership terminology in describing the federal government's interest in the continental shelf. See *ibid.*; S. Rep. 1592, 80th Cong., 2d Sess. 8 (1948), appended to S. Rep. 133, 83d Cong., 1st Sess. Pt. 1, at 57 (1953); see also *Outer Continental Shelf: Hearings on S. 1901 Before the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 573 (1953) (testimony of Jack B. Tate, Deputy Legal Advisor, Department of State).

In the absence of any clear indication that Congress intended to depart abruptly from its otherwise uniform practice in the context of ANILCA (and we have found none),[20] it should not be assumed that Congress adopted

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[20] The sole reference to the OCS in ANILCA is contained in Section 1001 (16 U.S.C. 3141) which requires that the Secretary undertake a systematic interdisciplinary study of the North Slope of Alaska, including assessment of potential oil and gas development and wildlife resources. Section 1001(a) (16 U.S.C. 3141(a)), in particular, provides that:

> The Secretary shall initiate and carry out a study of all Federal lands (other than submerged lands on the Outer Continental Shelf) in Alaska north of 68 degrees north latitude and east of the western boundary of the National Petroleum Reserve—Alaska, other than lands included in the National Petroleum Reserve—Alaska and in conservation system units established by this Act.

The parenthetical reference to the OCS does not, in our view, suggest that Congress believed that "Federal lands * * * in Alaska" would otherwise have included the OCS. The parenthetical may well have been inserted merely in an abundance of caution to ensure that references to the "North Slope," which in a related statute—the Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. 719 *et seq.*—Congress had defined to include the Continental Shelf (see 15 U.S.C. 719b), would not be read so broadly in ANILCA. Notably, the Alaska Natural Gas Transportation Act was under consideration by some of the same congressional committees and enacted at approximately the same time that the early ANILCA legislation was being proposed and drafted. See S. Rep. 95-1300, 95th Cong., 2d Sess. 110-111, 112 (1978); H.R. Rep. 95-1045, 95th Cong., 2d Sess. Pt. 2, at 31-35 (1978); S. Rep. 94-1020, 95th Cong., 2d Sess. 12-13 (1976). (Note that the Senate Committee on Energy and Natural Resources is the relevant successor to the jurisdiction of the prior Committee on Interior and Insular Affairs.) That Section 1001 does not imply that the OCS is "public" or "federal" lands for the purposes of ANILCA is confirmed, moreover, by reference to Section 1008 (16 U.S.C. 3148). Section 1008(a) requires the Secretary to "establish, pursuant to the Mineral [Lands] Leasing Act of 1920, as amended [30 U.S.C. 181 *et seq.*], an oil and gas leasing program on the Federal lands of Alaska *not subject to the study required by [Section 1001]*" (16 U.S.C. 3148(a) (emphasis added)). Because the Mineral

a different view when it enacted ANILCA. Accordingly, in this respect as well, the definitional provisions of ANILCA exclude the OCS from Section 810's scope.

2. Although where, as in this case, the meaning of the statutory language is plain, that should be "the end of the matter" (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842 (1984)), the structure of ANILCA and its legislative history and background further corroborate the plain meaning of these definitional provisions. ANILCA was the third in a series of congressional enactments, commencing with the Alaska Statehood Act in 1958 and ANCSA in 1971, concerned with the allocation of "public lands" in Alaska. See S. Rep. 95-1300, 95th Cong., 2d Sess. 103, 108-109 (1978); H.R. Rep. 95-1045, 95th Cong., 2d Sess. Pt. 1, at 65-77, 189, 192-195, 222-223 (1978); see also H.R. Rep. 96-97, 96th Cong., 1st Sess. Pt. 2, at 153-172 (1979). In neither of those earlier laws, however, could Congress possibly have contemplated that the OCS would fall within the scope of public lands in Alaska. In the Statehood Act, Congress permitted the State of Alaska to select 102,550,000 acres of vacant and unreserved "public lands * * * in Alaska" within 25 years of its admission (Pub. L. No. 85-508, § 6(b), 72 Stat. 340). Similarly, ANCSA provided that Native Alaskans could select up to 40 million acres of certain "public lands" (43 U.S.C. 1611; see 43 U.S.C. 1610(a)), and "public lands" was defined as "all Federal lands * * * located in Alaska" (43 U.S.C. 1602(e)). It is inconceivable that Congress intended to allow either the State of Alaska or Native Alaskans to select portions of the OCS—"a vital national resource reserve held by the [government] for the public" (43 U.S.C. 1332(3)).[21] These provisions shed

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Lands Leasing Act does not apply to the OCS (see note 21, *infra*), Congress plainly did not assume that the term "Federal lands * * * in Alaska" would, absent a parenthetical exclusion, include the OCS.

[21] Notably, ANCSA requires that the Secretary survey and place monuments around any area selected by the Native Alaskans (see

further light on the meaning of "public lands" in ANILCA, the third in the series of related enactments. Cf. *Huddleston* v. *United States*, 415 U.S. 814, 326 (1974).

The structure of ANILCA further suggests that Congress did not intend, *sub silentio*, to expand the meaning of "public lands." For example, Section 810 itself places the duty to perform a subsistence evaluation on "the head of the Federal agency having primary jurisdiction over such lands" (16 U.S.C. 3120(a)). The statutory reference to "primary jurisdiction" was plainly drafted solely with onshore lands in mind. Although there are specific federal agencies with primary jurisdiction over traditional onshore public lands (see, *e.g.*, 30 U.S.C. 352; see also H.R. Rep. 95-1045, *supra*, Pt. 1, at 69), no such "primary jurisdiction" exists generally with respect to the OCS. Instead, agency jurisdiction over the OCS and the waters above turns on the particular activity at issue (*e.g.*, fishing, mineral leasing, navigation, pollution control). See G. Coggins & C. Wilkinson, *Federal Public Land and Resources Law* 434 (1980).

In addition, in enacting ANILCA Congress specifically considered, and rejected, a proposal to require that activities in the area six miles seaward of coastal refuges (which would include portions of the OCS) conform to plans developed to minimize harm to the coastal refuges. See H.R. Rep. 95-1045, *supra*, Pt. 2, at 5-8, 41, 74-76, 81; S. Rep. 95-1300, *supra*, at 149-150. That proposal was

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43 U.S.C. 1612)—a requirement irreconcilable with the proposition that the Natives might select a portion of the OCS. Cf. *Mann* v. *Tacoma Land Co.*, 153 U.S. 273, 284-285 (1894). In addition, ANCSA provided the Secretary with 90 days to withdraw unreserved "public lands in Alaska" (43 U.S.C. 1616(d)(1)) in order to guard against "a land rush, in massive filings under the Mineral [Lands] Leasing Act [30 U.S.C. 181 *et seq.*]" (H.R. Conf. Rep. 92-746, 92d Cong., 1st Sess. 45 (1971))—a policy concern irrelevant to the OCS because the Mineral Lands Leasing Act is inapplicable (see 43 U.S.C. 1333(a)(1); *Justheim* v. *McKay*, 229 F.2d 29 (D.C. Cir.), cert. denied, 351 U.S. 933 (1956).

rejected because Congress "was concerned [about] the complexity of jurisdictions [that would result[] from such a designation of [seaward] areas" and concluded that the Secretary could accomplish the basic objectives of the designation under existing statutory authorities (S. Rep. 95-1300, *supra*, at 149-150; see also 124 Cong. Rec. 18025 (1978) (remarks of Sen. Stevens) (opposed to provision because ANILCA "intended to be a land bill."); S. Rep. 95-1300, *supra*, at 359 (Department of Commerce objections)). Identical concerns counsel against the addition of another layer of governmental regulation to OCS activities through Section 810. The OCSLA amendments of 1978, 43 U.S.C. 1331 *et seq.* Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.*, Marine Protection, Research, and Sanctuaries Act, 16 U.S.C. 1431 *et seq.*, Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.*, Fishery Conservation and Management Act, 16 U.S.C. 1801-1802, Endangered Species Act, 16 U.S.C. 1531 *et seq.*, and National Environmental Policy Act, 42 U.S.C. 4331 *et seq.*, all apply to activities on the OCS and supply the Secretary with ample authority to consider and protect subsistence resources affected by OCS activities. Indeed, prior to the court of appeals' ruling that Section 810 applied to Lease Sale 57, the Secretary considered the potential adverse impacts on subsistence resources as part of the NEPA planning process (see Sale 57 EIS 47-55, 136-148, 204, 206, 211-213, 223-224, 291-296). Having squarely rejected the coastal wildlife refuge "seaward areas" proposal, Congress can hardly be read as implicitly including in ANILCA an analogous statutory requirement regarding subsistence resources that suffers from the same deficiencies.

Finally, the entire thrust of congressional consideration of ANILCA, reflected throughout the legislative reports, hearings, and the legislative debates, supports the view that the OCS falls outside the scope of ANILCA. As described above, the purpose of ANILCA was to complete the three-step statutory process of achieving "a * * * reso-

lution of the status of [all the] public lands [in Alaska]." H.R. Rep. 95-1045, *supra*, Pt. 1, at 189; S. Rep. 95-1300, 95th Cong., 2d Sess. 103 (1978); see 16 U.S.C. 3101(d). The oft-repeated focus of this legislative effort was the allocation of the 375 million acres of lands and inland water areas within Alaska's formal boundaries (see, *e.g.*, H.R. Rep. 1045, *supra*, Pt. 1, at 65, 69, 192); the OCS's approximately 920 million acres off Alaska [22] (including 203 million acres of sedimentary basins), which were not included in that acreage, were simply not contemplated by anyone to be at issue (see, *e.g.*, 126 Cong. Rec. 18747 (1980) (remarks of Sen. Hart); 125 Cong. Rec. 11450 (1979) (remarks of Rep. Kostmayer); *id.* at 11129 (remarks of Rep. Udall); H.R. Rep. 96-97, 96th Cong., 1st Sess. Pt. 2, at 97 (1979) ("The State encompasses land and inland water areas of over 375 million acres and tide and offshore submerged lands encompassing some 37 million acres")).[23]

3. Respondents nonetheless argue, and the court of appeals held, that there is ambiguity in whether "public lands" includes the OCS and that, in light of that ambiguity and the rule of statutory construction favoring Indian tribal interests, Section 810 should be liberally construed in favor of the interests of Native Alaskans. As in *Escondido Mutual Water Co.* v. *La Jolla Indians*,

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[22] This estimate has been provided to us by the Department of the Interior.

[23] See also *Alaska National Interest Lands—Part 1: Hearings Before the Subcom. on Fisheries and Wildlife Conservation and the Environment of the House Comm. On Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 119-120, 329 (1979); *Alaska Lands —Part 2: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 2d Sess. 449 (1978); *Inclusion of Alaska Lands in National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems: Hearings Before the Subcomm. on General Oversight and Alaska Lands, House Comm. on Interior and Insular Affairs*, 95th Cong., 1st Sess. 18-19, 80 (1977).

466 U.S. 765, 781 (1984), "[t]his effort to circumvent the plain meaning of the statute by creating an ambiguity where none exists is unpersuasive." None of the purported "ambiguities" suggested by respondents or the court of appeals casts any serious doubt on the conclusion that the OCS falls outside the scope of Section 810.

a. First, respondents argued below, and the court of appeals concluded (Pet. App. 58a-61a), that ambiguity is created because Section 4(b) of ANCSA (43 U.S.C. 1603 (b) (emphasis added)), which extinguishes "[a]ll aboriginal titles, if any, and claims of aboriginal title *in Alaska*," applies to the OCS and there is a "compelling argument that the provisions of [ANILCA] were intended to have the same territorial scope" (Pet. App. 59a). This contention fails, however, because no such "compelling argument" exists. Section 810 of ANILCA and Section 4(b) of ANSCA serve entirely different purposes: Section 4(b) concerns only Alaska Native interests and extinguishes aboriginal claims to all federal, state, and private lands; in contrast, Title VIII of ANILCA concerns all "rural residents" of Alaska (16 U.S.C. 3101(c)) and applies only to "public lands." Even more fundamentally, although the two provisions both use the language "in Alaska," only in Section 4(b) of ANCSA is that language explicitly supplemented by a reference to "submerged land underneath all water areas both inland and offshore" (43 U.S.C. 1603(b)). The absence of similar language in ANILCA reinforces the conclusion that Congress did not intend that Title VIII of ANILCA would apply to the OCS.

The court of appeals (Pet. App. 59a) placed substantial weight on the fact that the Senate version of ANCSA had included a provision that protected subsistence hunting and fishing, which was deleted in conference based on the expectation that "the Secretary and the State [would] take any action necessary to protect the subsistence needs of the natives." H.R. Conf. Rep. 92-746, 92d Cong., 1st Sess. 37 (1971). The legislative history of ANILCA Title VIII, moreover, reveals that

Congress included Title VIII partly because it believed that the federal and state governments had failed to take such necessary protective measures. See S. Rep. 96-413, 96th Cong., 1st Sess. 230-231 (1979); S. Rep. 95-1300, 95th Cong., 2d Sess. 195-196 (1978); H.R. Rep. 95-1045, *supra*, Pt. 1, at 183-184. Finally, the court of appeals noted that Title VIII reflects congressional intent to protect the opportunities for rural residents to maintain a subsistence way of life and that "reliance by coastal villagers upon hunting and fishing in [OCS] waters * * * was well known" (Pet. App. 60a).

The court of appeals' premises do not, however, support its conclusion. To be sure, Title VIII and ANCSA share certain common roots, but that hardly provides a basis for concluding that the geographic scopes of Section 4(b) of ANCSA and Section 810 of ANILCA are coextensive. As described above, their respective statutory purposes and statutory language both plainly suggest otherwise. ANILCA is not a comprehensive law designed generally to protect subsistence resources of importance to rural residents of Alaska. ANILCA is public lands legislation, of which Title VIII is but one part. There is no suggestion that Congress intended that the scope of Title VIII would somehow be broader than that of ANILCA as a whole.[24] ANILCA's definition of "public lands" applies to the entire statute, including Title VIII. Of course, Congress is free to enact broader legislation designed to protect subsistence resources, but neither respondents' desire that Congress do so nor the consideration that such additional legislation might arguably be logically symmetrical to ANCSA's extinguishment of aboriginal rights is a substitute for such an enactment. Cf. *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 138 (1978) ("[t]he question * * * is not what a

[24] Notably, even the subsistence provision deleted from ANCSA applied (as the court of appeals acknowledged (Pet. App. 59a)) only to "public lands," which in ANCSA, as in ANILCA, does not encompass the OCS (see page 33, *supra*).

court thinks is generally appropriate to the regulatory process, it is what Congress intended").[25]

b. Second, respondents relied below (Pet. App. 58a) on several casual remarks by legislators during the debates to support their view that Congress used the term "in Alaska" in a "general," "[non]technical" sense. None of these isolated remarks, however, was specifically addressed to the question whether the OCS is "in Alaska" and, therefore, none has any direct bearing on that question. Respondents' reliance on these remarks to suggest

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[25] The court of appeals (Pet. App. 60a-61a) cited this Court's decisions in *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 110-116 (1949), and *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918), as supporting a more expansive interpretation of Title VIII's geographical scope. Neither case supports respondents' cause. In *Hynes*, the Court considered a statute that authorized the Secretary of the Interior to designate as an Indian reservation in Alaska "any * * * public lands which are actually occupied by Indians or Eskimos within said Territory." Act of May 1, 1936, ch. 254, § 2, 49 Stat. 1250. The Secretary relied upon this grant of authority to extend the boundaries of an Indian reservation 3,000 feet from the shore line at mean low tide (337 U.S. at 90 n.1). The fishery thereby included in the reservation was "within [the] Territory" (which extended three miles offshore) and lay over land owned by the United States. Similarly, in *Alaska Fisheries*, at issue was whether a commercial fish trap constructed within 600 feet of the high tide line of an island was within "the body of lands known as Annette Islands," as described in a reservation created by an Act of Congress (248 U.S. at 87). This Court concluded that Congress, by referring to a group of islands "as a single body of lands," had intended the reservation to embrace "the intervening and surrounding waters as well as the upland" (*id.* at 89). The waters and submerged lands in that case were, however, "in the interior of the Alexander Archipelago" (*id.* at 88), "were the property of the United States[,] and [were] within a district where the entire dominion and sovereignty rested in the United States" (*id.* at 87). Unlike the lands and waters involved in these two cases, the OCS lies beyond the nation's three-mile territorial sea, and the United States does not claim title to it. These cases thus do not support construing "in Alaska" in ANILCA to include the OCS, parts of which extend more than 350 miles from the Alaskan coast.

ambiguity in the statutory terms is, accordingly, unpersuasive.

Indeed, when those remarks are considered in their broader context, they reflect the theme, reiterated throughout ANILCA's legislative history and inherently inconsistent with respondents' view, that ANILCA would *not* affect activities on the OCS. Each remark addressed the issue whether certain provisions of the bill would "lock up" areas (*i.e.*, exclude mineral development). For instance, Representative Udall, a key sponsor of the bill, argued that ANILCA would not prevent production of oil and gas on the OCS, which instead would be regulated by comprehensive OCS legislation then recently enacted by Congress:

> Let me tell you what is the result of our bill on Alaska. Most of the oil the experts will tell you is not on land in Alaska. Most of it is offshore. There are 203 million acres of sedimentary basins that have been identified offshore in Alaska.
>
> Let me tell you how much is locked up by this bill. The answer is zero. Under other legislation produced by my friend, the gentleman from New York (Mr. MURPHY) and which we all support, we now have in place good [OCS] legislation. Plans are going forward and all the offshore lands in Alaska where the majority of the oil is to be found are left open by this bill.

125 Cong. Rec. 11128 (1979); see also *id.* at 9900 ("Offshore in Alaska there are 203 million acres of sedimentary basin. Let me tell the Members how much of that is put out of production by this bill so that they cannot get it. The answer is zero.").[26] Comparable state-

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[26] The other statement principally relied on by respondents and the court of appeals (Pet. App. 58a), made by Representative Young of Alaska, who was a major opponent of the legislation, reflects a similar understanding of ANILCA's scope. Representative Young argued that supporting ANILCA was tantamount to "support[ing] offshore drilling in Alaska first over onshore drilling

ments by other legislators reveal a common understanding—consistent with the plain meaning of the statutory language—that ANILCA "has nothing to do with the Outer Continental Shelf" (125 Cong. Rec. 11170 (1979) (remarks of Rep. Emery); see 126 Cong. Rec. 21889 (1980) (remarks of Sen. Bayh) ("100 percent of the offshore sites would remain available to exploration"); *id.* at 21657 (remarks of Sen. Cranston) (same); *id.* at 18747 (remarks of Sen. Hart) ("most of Alaska's undiscovered oil and gas lies offshore, and so would not be affected by these land designations"); 125 Cong. Rec. 11450 (1979) (remarks of Rep. Kostmayer) ("Two hundred and five million acres offshore are untouched by the * * * bill"); see also 16 Weekly Comp. Pres. Doc. 2756 (Dec. 2, 1980) (remarks of President Carter on signing ANILCA into law) ("A hundred percent of the offshore areas * * * [with] potentially productive oil and mineral areas will be available for exploration or for drilling")).[27]

c. Finally, the court of appeals' "most compelling reason" for extending Section 810 to the OCS was that "Title VIII was adopted to benefit the Natives" and that ambiguities in the statute must be resolved in their favor (Pet. App. 62a). The court's (and respondents') reliance on the canon of statutory construction favoring the resolution of ambiguities in statutes in favor of Indians is, however, misplaced. "The canon of construction * * *

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* * * doing a great disservice to the environment" (125 Cong. Rec. 9907 (1979)).

[27] The court of appeals discounted the significance of these expressions of legislative intent on the ground that they "are not inconsistent with the position that Title VIII includes the [OCS] since nothing in Title VIII precludes oil and gas development in the areas to which it applies" (Pet. App. 63a). The common thrust of the statements is not, however, merely that OCS activities would not be "preclude[d]"; they reflect quite unambiguously the view that those activities have "nothing to do with [ANILCA]," "would not be affected," and would be "untouched by the" statute.

does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina* v. *Catawba Indian Tribe of South Carolina*, No. 84-782 (June 2, 1986), slip op. 8. As shown above, there is no ambiguity in this case concerning the scope of ANILCA. The OCS is neither "in Alaska" nor subject to a formal claim of "title" by the United States.

Furthermore, the meaning of "public lands" in Alaska is not, in any event, an issue peculiar either to Title VIII or to the interests of Native Alaskans. ANILCA contains one definition of "public lands" applicable to the entire statute. Hence, resolving an "ambiguity" concerning the meaning of a generally applicable term such as "public lands" in favor of Native Alaskans in one context would necessarily affect the scope of the statute as a whole. In these circumstances, the rationale of the canon necessarily loses much of its force. Cf. *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 115-124 (1960). Certainly, the commonsense notion that Congress does not normally intend the same term to have different meanings in the same statute (particularly where, as here, the statute defines the term once for the entire Act) diminishes, if it does not eliminate altogether, the canon's force. The court of appeals ignored this important consideration in suggesting (Pet. App. 64a-65a n.9) that Title VIII should simply be read as having a different definition of "public lands" from that applying to the rest of ANILCA.[28] The unpersuasiveness of this suggestion is

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[28] Notably, even the Alaska Federation of Natives' (AFN) proposed text for what eventually became Section 810 would not have included the OCS. AFN's version would have applied to "public lands in * * * Subsistence Management Zones" (see *Inclusion of Alaska Lands in National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems: Hearings Before the Subcomm. on General Oversight and Alaska Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong., 1st Sess. Pt. XII, at 497 (1977)); a subsistence zone was to be "within the exterior boundaries of each of the twelve regional corporations established by

compounded by the fact that the protection for subsistence uses provided by Title VIII is not limited to uses by Alaskan Natives.[29]

III. THE POSSIBILITY THAT RESTRICTIONS ON SUBSISTENCE USES MAY ARISE AT THE PRODUCTION STAGE WOULD NOT, IN ANY EVENT, TRIGGER SECTION 810'S NOTICE, HEARING, AND FINDINGS REQUIREMENTS AT THE LEASING STAGE

Following *Gambell I*, Interior prepared a post-sale Section 810 evaluation for Lease Sale 57 (Pet. App. 81a-106a) to determine whether the leasing of tracts "would significantly restrict subsistence uses" (16 U.S.C. 3120 (a)). The evaluation concluded that the leasing of tracts in Sale 57 and associated preliminary activities "will not significantly restrict subsistence uses" (Pet. App. 85a); accordingly, the additional notice, hearing, and findings requirements of Section 810 were not followed. The evaluation noted as well that exploratory activities "will not significantly restrict subsistence uses," but that if

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ANCSA" (*id.* at 492), which by definition would not have included the OCS (see 43 U.S.C. 1606(a)).

[29] There is, for this reason as well, considerable doubt whether the canon of statutory construction favoring Indian tribes is relevant at all to this case. Title VIII of ANILCA was enacted for the benefit of "rural Alaska residents" (see 16 U.S.C. 3113). While rural Native Alaskans are certainly among the beneficiaries of the Title, the statute is in both form and substance racially neutral (see, *e.g.*, H.R. Rep. 95-1045, *supra*, Pt. 1, at 78 (purpose to protect both Native and non-Native people)). But see 126 Cong. Rec. 29279 (1980) (remarks of Rep. Udall). In addition, there is some question whether a trust relationship (upon which the canon is bottomed; see, *e.g.*, *Montana* v. *Blackfeet Tribe*, No. 83-2161 (June 3, 1985), slip op. 6) exists between the United States and the Alaska Natives, at least subsequent to ANCSA. See 43 U.S.C. 1601(b) ("the settlement should be accomplished * * * without creating a reservation system or lengthy wardship or trusteeship * * *"); see also S. Rep. 92-405, 92d Cong., 1st Sess. 108 (1971). Cf. *South Carolina* v. *Catawba Indian Tribe*, *supra*. The Court need not, however, reach this issue in this case.

the development and production stage is reached, which is "not likely," development and production activities "may significantly restrict subsistence uses in certain areas" (*id.* at 85a, 92a-99a, 103a, 106a). The evaluation stressed (*id.* at 85a) that the agency would perform additional Section 810 evaluations for future exploration plans and productions plans, the results of which might trigger the additional procedural requirements of Section 810(a)(1)-(3).

The court of appeals held that respondents had established a strong likelihood of success on their claim that Interior had violated Section 810 by not following the additional procedural requirements of Section 810(a)(1)-(3). The court thus ruled, in effect, that a mere threat of a significant subsistence restriction at the production stage triggers those requirements at the leasing stage. That ruling, too, was erroneous.

1. In *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984), this Court concluded that under the OCSLA amendments of 1978, the OCS leasing process consists of four separate, distinct stages: (1) planning a five-year nationwide leasing program (43 U.S.C. 1344); (2) conducting a lease sale (43 U.S.C. 1337(a)); (3) exploration (43 U.S.C. 1340); and (4) development and production (43 U.S.C. 1351). See 464 U.S. at 337. "Each stage involves separate regulatory review that may, but need not, conclude in the transfer to lease purchasers of rights to conduct additional activities on the OCS. And each stage includes specific requirements for consultations with Congress, between federal agencies, or with the States." *Ibid.* On this basis, the Court reasoned that because a lease sale authorizes only limited activities on the OCS, a lease sale can not be deemed to have a "direct effect" on the coastal zone based on impacts potentially arising only at later stages.

By its plain terms, Section 810 similarly applies to each distinct stage, separately. As in *Secretary of the Interior* v. *California*, therefore, a lease sale should not

be deemed to restrict significant subsistence resources based on restrictions potentially occurring (if at all) only at the development and production stage. Section 810 applies not only to a decision to "lease" public lands, but also to any decision to "permit the use" of those lands (16 U.S.C. 3120). The statutory language explicitly permits a staged approach wherein Section 810 is applied at the lease stage and subsequently to each decision to "permit the use" of the OCS for exploration or production. To be sure, in performing a Section 810 evaluation for one stage, the agency may look to related future stages, but for the purposes of determining whether the additional procedural requirements of Section 810 are triggered, the only relevant inquiry is whether the particular disposition of lands at issue—in this case, leasing—"would significantly restrict subsistence uses" (16 U.S.C. 3120). Having concluded that the leasing stage would not involve such a restriction, Interior did not violate Section 810 in declining to follow its additional procedures.

The court of appeals' effort to distinguish *Secretary of the Interior* v. *California* is unpersuasive (Pet. App. 13a-14a). Contrary to the court of appeals' analysis, this Court's reasoning in that decision is not limited in its relevance only to the particular statute there at issue—the Coastal Zone Management Act (CZMA) (16 U.S.C. 1451 *et seq.*). To the contrary, this Court explained that "[t]he 1978 OCSLA amendments are relevant not because they change any part of CZMA, but because they change, or at least substantially clarify, the rights transferred by Interior when a lease is sold" (464 U.S. at 341 n.21). "Since 1978, the purchase of an OCS lease, standing alone, entails no right to explore for, develop, or produce oil and gas resources on the OCS" (*id.* at 340). Moreover, the policy underlying the OCSLA amendments—to separate the stages in order to "forestall premature litigation regarding adverse environmental effects that all agree will flow, if at all, only from the latter stages of OCS exploration and production" (*id.* at 341)—

applies with as much force to ANILCA in this case as it did to the CZMA in *Secrtary of the Interior* v. *California*. See also *Village of False Pass* v. *Clark*, 733 F.2d 605, 608-609, 611, 614 (9th Cir. 1984) (applying stage-by-stage analysis to agency compliance with Endangered Species Act and NEPA). Finally, the court of appeals' assertion (Pet. App. 14a) that the "specific" terms of ANILCA must control over the "general" ones of the OCSLA is erroneously premised. The 1978 OCSLA amendments specifically define the legal significance of an OCS lease; ANILCA does not address the issue at all.

2. The court of appeals' ruling also disregards the express words of the statute and would require Interior to engage in uninformed, speculative judgments of little relevance to the purposes of ANILCA. Section 810 requires implementation of its notice, hearing, and findings procedures only if the proposed disposition of public lands "would" substantially restrict subsistence resources, a term which suggests at least a likelihood that the event will occur (see *INS* v. *Stevic*, 467 U.S. 407, 422 (1984)). Interior, however, has found that exploration will not significantly restrict subsistence resources and that the development and production stage is unlikely to occur at all (Pet. App. 85a). Consequently, even if those later OCS stages are relevant to the current evaluation of the significance of subsistence restrictions, the "would" standard has plainly not been met in this case.[30] The

[30] The court of appeals characterized the threshold standard as whether the proposed action "may" significantly restrict subsistence uses (Pet. App. 13a) and, relying on Interior's conclusion that development and production "may significantly restrict subsistence uses in certain areas" (*id.* at 85a), held that Interior erred in not complying with Section 810's notice, hearing, and findings requirements. "Would" is not the equivalent of "may," however, and, in all events, the court ignored Interior's express caveat that "development and production activities are not likely to occur" (Pet. App. 85a). We note, moreover, that the court of appeals in a more recent ruling compounded its error in this case by upholding the grant of a preliminary injunction against a lease sale where Interior had found that significant subsistentce restrictions were

important purposes of Section 810 are hardly served by requiring Interior to expend resources engaging in detailed factual inquiries concerning events so remote in time and possibility (*i.e.*, whether and where recoverable resources might exist, and how lessees would plan to develop them) that mere speculation is the only result. Cf. *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 776 (1983) ("Time and resources are simply too limited for us to believe that Congress intended to extend NEPA as far as the Court of Appeals has taken it.") (citation omitted).

IV. A CONSTRUCTION THAT SECTION 810 APPLIES TO THE OCS SHOULD NOT IN ANY EVENT BE APPLIED RETROACTIVELY TO EITHER LEASE SALE 57 OR 83 BECAUSE IT WOULD SERVE NO MEANINGFUL STATUTORY PURPOSE AND WOULD UPSET SETTLED TRANSACTIONS ENTERED INTO IN GOOD FAITH

In *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971) (citations omitted), this Court set forth a three-factor test for determining whether a decision should be given solely prospective effect: (1) whether "the decision to be applied non-retroactively * * * establish[es] a new principle of law"; (2) " 'whether retrospective operation will further or retard * * * operation' " [" 'of the rule in question, its purpose and effect' "]; and (3) whether "retroactive application * * * 'could produce substantial inequitable results.' " No one seriously disputes that the first factor is met in this case. As the court of appeals acknowledged (Pet. App. 24a), " *Gambell I* established a new principle of law in construing section 810(a) of [ANILCA] as applicable to the outer continental shelf." Indeed, the ruling in *Gambell I* was flatly contrary to the agency position and the Alaska district court ruling (Pet. App. 69a).

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unlikely to occur at any stage of OCS development. See *Tribal Village of Akutan* v. *Hodel*, 792 F.2d 1376 (9th Cir. 1986) (*reprinted in* U.S. Reply Memo App.).

The remaining two factors similarly support non-retroactive application in this case. As previously described (see pages 4-5, *supra*), even prior to *Gambell I*, Interior prepared substantial preleasing analyses of the impacts on subsistence uses. The district court specifically found that the factors specified in Section 810(a) were considered, albeit not with ANILCA "clearly in mind" (Pet. App. 38a, 42a). After *Gambell I*, Interior prepared Section 810 evaluations for each approved exploration plan in the Sale 83 area, and those plans have never been challenged (see page 9, *supra*). Interior also announced that, while *Gambell I*'s holding remains unreversed, it would prepare new subsistence evaluations in all lease sale areas should development and production ever be proposed (see page 8, *supra*). In these circumstances, requiring Interior to reconsider subsistence issues as they pertain to the initial decision to lease would serve no meaningful statutory purpose.

Finally, "the inequity imposed by retroactive application" (404 U.S. at 107) strongly weighs against retroactive application. Balanced against respondents' desire for a re-evaluation of matters already studied are the strong public interest in avoiding unnecessary disruptions to OCS exploration and development, as well as the enormous investments made by the intervenor oil companies pursuant to the lease sales and the exploration plan approvals.[31] This Court has declined to give retro-

[31] While it would be unjust to apply this new construction of ANILCA to either Lease Sale 57 or Lease Sale 83, the inequity would be particularly pronounced with regard to Lease Sale 83, which occurred without litigation challenge and after the district court in the Lease Sale 57 case had ruled that Section 810 did not apply. The mere pendency of an appeal from that ruling, moreover, did not render reliance on the lower court's ruling unreasonable. Cf. *Huron Holding Corp.* v. *Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941) ("appeal * * * does not—until and unless reversed—detract from * * * decisiveness and finality" of lower court ruling); *Deposit Bank* v. *Frankfort*, 191 U.S. 499, 510-512 (1903). The district court had upheld the construction of the

active effect to new constructions of statutes where it would similarly disrupt financial arrangements made in reliance on a prior construction. See *City of Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 719-721 (1978); *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073 (1983).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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statute advanced by the agency primarily responsible for its implementation. Certainly Interior was not obliged to alter its Section 810 program with respect to Lease Sale 83 based on the possibility that the court of appeals might reverse the district court in the Lease Sale 57 lawsuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

AMOCO PRODUCTION COMPANY, *et al.*,
Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.*, which applies to public lands "in Alaska," extinguished Alaska Natives' aboriginal hunting and fishing rights outside the three-mile territorial limits of the State of Alaska?

2. Whether Title VIII of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101 *et seq.*, which applies to public lands "in Alaska," protects Alaska Natives' hunting and fishing rights outside the three-mile territorial limits of the State of Alaska?

3. Whether the United States holds title to the mineral resources of the Outer Continental Shelf so as to bring oil and gas leases under the Conservation Act's definition of "Federal lands"?

4. Whether Secretary Hodel can rely on post-sale evaluations to rationalize why Secretary Watt and Secretary Clark failed to comply with the mandates of Section 810 of the Conservation Act when holding OCS Lease Sales 57 and 83?

5. Whether Section 810 of the Conservation Act—which directs that certain studies and evaluations take place "[i]n determining whether to . . . lease" and which provides that "[n]o such . . . lease . . . which would significantly restrict subsistence uses shall be effected"—applies to leasing?

6. Whether an order enjoining exploration and development on tracts leased in violation of Section 810

of the Conservation Act was an appropriate remedy when the parties against whom the injunction issued had earlier represented to the court that the proper remedy for a violation of Section 810 was a permanent injunction rather than an order voiding the lease sales?

7. Whether an injunction is the appropriate remedy for a violation of a statute whose plain language and purposes can only be effectuated and implemented by immediate injunctive relief?

8. Whether the oil companies, in proceeding to bid at OCS Lease Sales 57 and 83, could justifiably rely on Interior's interpretation of the Conservation Act when they were party defendants in a lawsuit challenging that interpretation?

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STATUTES

Relevant provisions of Title VIII of the Alaska National Interest Lands Conservation Act (Conservation Act), 16 U.S.C. § 3101 *et seq.* and the Alaska Native Claims Settlement Act (Claims Settlement Act), 43 U.S.C. § 1601 *et seq.* are reproduced in the appendix to this brief. (1a-4a).

STATEMENT OF THE CASE

A. INTRODUCTION

This case seeks to ensure that the statutory and common law protections for the hunting and fishing rights of Alaska's aboriginal people are applied fairly and consistently. The respondents are the tribal village of Gambell, the tribal village of Stebbins, and Nunam Kitlutsisti. The tribal villages of Gambell and Stebbins are federally recognized Indian Tribes.[1] The village of Gambell is located on St. Lawrence Island, an island situated near the Soviet Union in the Bering Sea. The village of Stebbins is located on the northeastern shore of the Yukon River Delta, an estuary bordering Norton Sound and the Bering Sea. Nunam Kitlutsisti is an intertribal organization representing 56 villages in the Yukon-Kuskokwim Delta. With a name literally translated from Yupik Eskimo as the "defender of life and land," Nunam Kitlutsisti has the mission of promoting and protecting the traditional hunting and fishing rights of its members.

This case concerns two Outer Continental Lease Sales: OCS Sale 57 and OCS Sale 83. OCS Sale 57 (Norton Sound) was held on March 15, 1983. The sale offered 429 oil and gas leases to 2.4 million acres of the OCS lying under the waters of Norton Sound. OCS Sale 83 (Navarin Basin) was held on March 16, 1984, about one year after the Norton Sale. It offered 3,700 oil and gas leases to

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[1] 51 Fed. Reg. 25,115 (July 10, 1986).

approximately 24 million acres of the OCS in the geologic formation called the Navarin Basin.

Unchanged from the date of filing in 1983, the legal claim advanced by the tribal villages is that Interior held both sales in either derogation of or wrongful reliance on one of two statutes which delimit the hunting and fishing rights of Alaska Natives. (JA 18). The two statutes are the Alaska Native Claims Settlement Act[2] and Title VIII of the Alaska National Interest Lands Conservation Act.[3] The Claims Settlement Act settled the aboriginal land claims of Alaska Natives, extinguishing in the process aboriginal title to lands situated "in Alaska." Part of the land claims settlement, Title VIII of the Conservation Act protects hunting and fishing on lands the title to which was extinguished by the Claims Settlement Act.[4] Both Acts apply to lands situated "in Alaska." Although they use precisely the same terms, relate to precisely the same subject matter, and are derived from a common document, Interior insists they should be construed inconsistently. Its position is that the Claims Settlement Act extinguishes aboriginal rights on the OCS but that the Conservation Act does not protect similar rights in the same area.

The tribal villages contend, and the court of appeals held, that this inconsistent position is contrary to the controlling language of the two statutes. The two statutes apply to the same geographic area. If neither the Claims Settlement Act nor the Conservation Act applies to the OCS, Alaska Natives retain their aboriginal rights, and oil exploration and development must proceed in a manner consistent with these claims as well as Interior's trust

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[2] Act of Dec. 18, 1971, Pub. L. No. 92-203, 85 Stat. 688, *codified at* 43 U.S.C. § 1601 *et seq.*

[3] Act of Dec. 2, 1980, Title VIII, Pub. L. No. 96-487, 94 Stat. 2371, *codified at* 16 U.S.C. § 3101 *et seq.*

[4] D. Case, ALASKA NATIVES AND AMERICAN LAWS 299 (1984).

responsibility. Alternatively, if both statutes apply to the OCS, oil development on the OCS must proceed in a manner consistent with the procedural and substantive protections provided by Congress in the Conservation Act.

B. THE IMPORTANCE OF SUBSISTENCE HUNTING AND FISHING RIGHTS

To fully appreciate why Congress could not have intended that the Conservation Act and the Claims Settlement Act be construed inconsistently, it is necessary to understand the importance of subsistence to the physical and cultural survival of Alaska's Native peoples. The hunting and fishing rights at issue in this case are critical to the well being of Alaska Natives. Although a life of fishing and hunting may be a quaint anachronism for an industrial society, cultural forces and lack of integration into the Western cash economy join together to make it the prime focus of life in rural Alaska.

Subsistence is loosely defined as the harvest of wild resources to provide food and raw materials for personal use, sharing, and distribution to kin, in accordance with established custom and tradition.[5] A cyclical process, it begins when Alaska Natives harvest fish and game. It continues as they directly consume it, share it, exchange it on local trade networks, or sell it for cash. Cash is then used to buy hunting and fishing equipment, with the process being completed when that equipment is used in further harvesting efforts.

Subsistence activities are central to the economy of western Alaska and the Bering Sea region.[6] Rural Native

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[5] See R. Little and L. Robbins, EFFECTS OF RENEWABLE RESOURCE HARVEST DISRUPTIONS ON SOCIOECONOMIC AND SOCIOCULTURAL SYSTEMS: ST. LAWRENCE ISLAND, Alaska OCS Socioeconomic Studies Program, Technical Report No. 89 (June 1984) [hereinafter Little and Robbins]. *See also* 16 U.S.C. § 3113 (defining "subsistence uses" for the purposes of the Conservation Act).

[6] See generally LITTLE AND ROBBINS, *supra* n. 5; A. Fienup-Riordan,

Alaskans have little access to the cash economy. Few can find jobs, for industry does not exist. Cash incomes must come from occasional wages, state or federal transfer payments, or a combined strategy in which one member of the family works while another hunts and fishes.[7] Living in rural Alaska is also expensive. The high cost of living is largely attributable to the high transportation costs of shipping over great distances in inclement weather.

The net result of low incomes and a high cost of living is poverty. Native Alaska constitutes a Third World within the United States. Many Native Alaskans are fluent only in their native tongue, and most live under conditions unknown elsewhere in the United States. The poverty here is broad and deep. In 1978, the per capita income in the Norton Sound region (Wade Hampton) was only 16% of the average United States per capita income.[8] In practice, this poverty translates into a lack of social amenities such as bathrooms, running water, and telephones.

Alaska Natives have traditionally relied upon subsistence hunting and fishing to overcome this lack of economic opportunity. The economic importance of these activities is illustrated by the fact that the value of food secured by subsistence hunting and fishing frequently exceeds cash incomes. In 1976, the annual value of a subsistence harvest for a family of four in western Alaska was $13,000. At the same time, the average cash income for the same family was approximately $5,263.[9]

NAVARIN BASIN SOCIOCULTURAL SYSTEMS ANALYSIS, Alaska OCS Socioeconomic Studies Program, Technical Report No. 70 (January 1982).

[7] *See, e.g.*, State of Alaska House Research Agency, PERSONAL INCOME IN THE LOWER YUKON-KUSKOKWIM REGION (1982).

[8] U.S. Department of the Interior, FINAL ENVIRONMENTAL IMPACT STATEMENT: PROPOSED OUTER CONTINENTAL SHELF OIL AND GAS LEASE SALE 57, NORTON SOUND (1982) [hereinafter Norton FEIS] at Table III.B.4.-3.

[9] R. Wolfe, AN ECONOMIC ANALYSIS OF FOOD PRODUCTION IN A WESTERN ALASKA COMMUNITY 23 (1977).

In addition to its economic importance, subsistence hunting and fishing is central to the Eskimo's cultural survival. To an Eskimo, language, culture, spiritual beliefs, customs, and respect for others and for oneself are all tied into a holistic world-view centered around the traditional hunting, fishing, and gathering way of life. Critical life activities are centered on hunting, fishing, and sharing harvests with family and fellow villagers.[10] Because subsistence is crucial, disruptions of subsistence activities are likely to result in significant adverse changes in the cultural well-being and stability of western Alaska Native communities.[11]

C. THE NATIVE CLAIMS SETTLEMENT ACT AND TITLE VIII OF THE CONSERVATION ACT

Since subsistence hunting and fishing is so economically and culturally important to Alaska Natives, it is unsurprising that issues relating to these activities have been key elements in the two major statutes dealing with the rights of Alaska Natives, the Claims Settlement Act and Title VIII of the Conservation Act. As implied by its name, the Claims Settlement Act was a settlement between the United States and Alaska Natives. With the support of the Nixon administration, the oil industry, and Alaska Natives, it was passed to resolve land claims that threatened to block construction of the Trans-Alaska oil pipeline.[12] The terms of the settlement provided for an extinguishment of aboriginal claims in exchange for money, fee title to fewer lands, and protections for subsistence uses. The Act established thirteen regional corporations and various vil-

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[10] Norton FEIS, *supra* n. 8, at 48-49.

[11] LITTLE AND ROBBINS, *supra* n. 5, at Chapter XV; J. Jorgensen, EFFECTS OF RENEWABLE RESOURCE HARVEST DISRUPTIONS ON SOCIOECONOMIC AND SOCIOCULTURAL SYSTEMS: NORTON SOUND, Alaska OCS Socioeconomic Studies Program, Technical Report No. 90 (January 1984) [hereinafter JORGENSEN] at 327-354.

[12] J. Hanrahan and P. Gruenstein, LOST FRONTIER: THE MARKETING OF ALASKA 95 (1977)

lage corporations and awarded these corporations three major forms of compensation: money; royalties from oil, gas, and mineral leases; and 40 million acres of unallocated federal lands. 43 U.S.C. § 1601 *et seq.*

The Act did not, however, expressly protect subsistence uses. Although initial drafts included subsistence provisions,[13] the eventual agreement was based on the congressional representation that Interior and the State of Alaska would adequately protect those uses. To achieve this result, Congress instructed the Secretary of the Interior to provide for the subsistence needs of Alaska Natives.[14]

When Interior failed to heed this admonition, Congress was forced to act. 126 Cong. Rec. 29,278 (November 12, 1980) (statement of Representative Udall). Resurrecting language earlier deleted from drafts of the Claims Settlement Act,[15] it included in Title VIII of the Conservation Act systematic and comprehensive protections for subsistence hunting and fishing. With respect to the disposition of public lands, the Act declares that "the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence. . . ." 16 U.S.C. § 3112(1). It further declares that all leasing must allow, to the maximum extent possible, "the opportunity for rural residents engaged in a subsistence way of life to do so." *Id.* To achieve these ends, Section 810 requires land managers to carefully evaluate the impact of leasing on subsistence uses and resources, and to identify alternative land selections before making any leasing decisions. 16 U.S.C. § 3120(a). For leasing that might significantly restrict subsistence activities, the land

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[13] *E.g.*, S. 3859, 90th Cong., 2d Sess. (1968); S. 1830, 91st Cong., 1st Sess. (April 15, 1969); S. 35, 92d Cong., 1st Sess. (1971).

[14] Conf. Rep. No. 746, 92d Cong., 1st Sess. 37, *reprinted in* 1971 U.S. Code Cong. & Ad. News 2247, 2250.

[15] *Compare* S. 835, 92d Cong., 1st Sess. § 16(b)(1) (1971) *and* H.R. 7039, 92d Cong., 1st Sess. § 16(b)(1) (1971) *with* 16 U.S.C. § 3120(a).

manager, before issuing any leases, must ensure that: (1) the restriction is necessary; (2) the leasing involves the minimal amount of public land; and (3) reasonable steps will be taken to minimize adverse impacts on subsistence uses. 16 U.S.C. § 3120(a)(1)-(3).

Congress ensured that the Conservation Act would apply to all lands affected by the Claims Settlement Act. The Conservation Act covers all conceivable federal rights, placing "lands, waters, and interests therein" under its umbrage. 16 U.S.C. § 3102(1). The geographic coverage is similarly broad. Mirroring and applying co-extensively with the Claims Settlement Act from which it was derived, the Conservation Act protects all federal lands "in Alaska." 16 U.S.C. § 3102(3).

D. INTERIOR'S INCONSISTENT IMPLEMENTATION OF THE CLAIMS SETTLEMENT ACT AND TITLE VIII OF THE CONSERVATION ACT

After Congress passed the Conservation Act in 1980, Alaska Natives hoped that Interior would develop the lands to which aboriginal title had been extinguished in a manner consonant with their subsistence uses. The need for careful development was evident with respect to OCS leasing. Interior predicted that OCS leasing would directly reduce subsistence harvests by killing some percentage of the fish and wildlife taken for subsistence purposes. It further predicted that OCS leasing would substantially increase the human population over a short period of time. This population increase would place additional pressure on existing stocks of fish and game, introduce significant inflation into the subsistence economy, and rend the social fabric. Interior indicated that a sale as modest as Norton Sound would lead to an increase in crime, suicide, alcoholism, drug abuse, venereal disease, and poverty.[16]

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[16] NORTON FEIS, *supra* n. 8, at 46-47, 134-35.

Despite the compelling case for a studied consideration of subsistence uses and needs, Secretary Watt made clear he would pay them no heed. His attitude was illustrated by his reaction to suggestions that OCS leasing might seriously disrupt the subsistence activities of Alaska Natives. Responding to these concerns, he cavalierly insisted that "35,000 people on the edge of the world" would not influence his plans to lease the Alaskan OCS.[17]

In practice, his refusal to consider subsistence users when conducting OCS leasing was expressed in an inconsistent application of Title VIII and Section 4(b) of the Claims Settlement Act. The inconsistency originated in *Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982), *aff'd on other grounds*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, ___U.S.___, 106 S. Ct. 68 (1985) (*Inupiat Community*). There, Inupiat Eskimo asserted aboriginal title to OCS lands which they had traditionally used and occupied. To defeat these claims, Secretary Watt took the position that the Claims Settlement Act abolished aboriginal hunting and fishing rights outside the territorial waters of the State of Alaska. He argued that a technical interpretation restricting the term "in Alaska" to the territorial sea would be "tortured." The oil companies, also parties in that case, alleged that the phrase was geographically descriptive and that such a use was "a perfectly natural one."

After adopting the position that the Claims Act applied to the OCS, Secretary Watt then took precisely the opposite position with respect to Title VIII. His theory for ignoring Title VIII was premised on the assumption that the Conservation Act could not be interpreted as applying beyond the State's territorial waters. Without holding hearings or otherwise opening the administrative process to public comment, Secretary Watt concluded that the term "in Alaska" did not include the OCS.

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[17] The Wall Street Journal, March 12, 1986, at 64.

E. *GAMBELL I* AND *GAMBELL II* COMPEL INTERIOR TO CONSISTENTLY IMPLEMENT THE CLAIMS SETTLEMENT ACT AND TITLE VIII OF THE CONSERVATION ACT

The tribal villages of Gambell and Stebbins called into question Interior's attempt to create a gap in the protections for the subsistence uses of Alaska Natives when they filed this case on March 4, 1983. Their claim was that the term "in Alaska" had to be construed consistently. As used in two sister statutes—the Claims Settlement Act and Title VIII of the Conservation Act—the term was either geographically or technically descriptive. If geographically descriptive, Title VIII applied to OCS leasing. If technically descriptive, Alaska Natives retained their aboriginal rights beyond the marginal sea because such rights had not been extinguished by the Claims Settlement Act.

The suit forced Interior to justify an inconsistent application of an identical term in two sister statutes. The resulting response lacked grace. Before the tribal villages filed *Gambell I*,[18] Secretary Watt and the oil companies had contended in *Inupiat Community* that the phrase "in Alaska" referred to an area lying beyond the high tide mark. After *Gambell I* was filed, they contended that the phrase could not possibly have that meaning, and that it described a limited geographic area lying inside the marginal sea. The oil companies, largely conceding that the Claims Settlement Act did not apply to the OCS, argued that paramount federal authority abolished aboriginal title. Secretary Watt, conceding that the statutes were vague, contended that their geographic scope had to be resolved by their legislative history. That history, he further argued, demonstrated that Congress intended for the two sister statutes to apply to totally different areas.

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[18] *Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1974) (Fed. Pet. App. 44a).

The Court of Appeals for the Ninth Circuit rejected these claims, holding that the term "in Alaska" had the same meaning in the sister statutes. Eschewing the alternative of reading the term technically, it held that the phrase was geographically descriptive, encompassing areas outside as well as inside the territorial waters of the State.[19] It determined that the Claims Settlement Act extinguished Native hunting and fishing rights outside the three-mile limit and that Title VIII of the Conservation Act protected similar rights in the same area. *Gambell I*, 746 F.2d at 579, 582.

The court of appeals did not, however, void the sale as requested by the tribal villages. It refused this request at the urging of both the Secretary and the oil companies. To avoid having the sale voided, the Secretary and the oil companies conceded that should the court find that the Conservation Act applied to OCS leasing, the tribal villages would be entitled to an injunction. *See Gambell I*, 746 F.2d at 582; *Village of Gambell v. Hodel*, 774 F.2d 1414, 1417 (9th Cir. 1985) (*Gambell II*). Accordingly, the court of appeals remanded the matter to the district court for the limited purpose of deciding whether the sale should be voided or whether further activities should be permanently enjoined. *Gambell I*, 746 F.2d at 582-83.

In spite of their representation to the *Gambell I* court that an injunction was the proper remedy, the Secretary and the oil companies reversed their position on remand and argued that an injunction was not an appropriate remedy. They claimed that Interior had fully and completely, albeit indirectly, complied with the Conservation Act when following the mandates of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* To buttress this claim, they submitted a post-sale evaluation purporting to

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[19] *See Gambell I*, 746 F.2d at 573; *Inupiat Community*, 746 F.2d at 571.

fulfill all the statutory requirements of the Conservation Act. Published about a month after the tribal villages had moved for a preliminary injunction, the document asserted that leasing Norton Sound would not significantly restrict subsistence uses. (Fed. Pet. App. 81a).

The district court rejected the inadvertent compliance argument but failed to issue the preliminary injunction. Expressing a natural skepticism that the Secretary could "inadvertently comply" with the Conservation Act, it judged that the Secretary had violated the statute on a number of counts. Chief among the violations were the Secretary's failure to prepare subsistence studies for the two challenged lease sales with the precepts of the Act clearly in mind and his failure to give the notice, hold the hearings, and make the findings required by Section 810(a)(1)-(3) of the Conservation Act. Nevertheless, the district court failed to enter the injunction requested by the tribal villages. Without explaining its reason or rationale, and without expressly balancing the equities, it summarily concluded that an injunction was not an appropriate remedy in the case. (Fed. Pet. App. 37a-43a).

The court of appeals reversed. Noting that Interior and the oil companies had previously represented to it that an injunction was the appropriate remedy, it determined that the district court erred in not granting the tribal villages this relief. *Gambell II*, 774 F.2d at 1416-17. The court of appeals based its decision on traditional equitable principles as well as its finding that injunctive relief was the only available remedy for leasing in violation of the Conservation Act. Following this decision, Interior and the oil companies petitioned for a writ of certiorari on issues presented by both *Gambell I* and *Gambell II*. The tribal villages cross-petitioned on the issue of whether the Claims Settlement Act extinguished aboriginal title to the OCS. The Court granted Interior's and the oil companies' petitions. It took no action on the villages' cross-petition.

SUMMARY OF ARGUMENT

Alaska Natives hold aboriginal title to portions of the OCS or, as the court of appeals found, the Conservation Act protects their subsistence uses on all OCS lands.

I. Alaska Natives hold aboriginal title to portions of the OCS. Federal common law as well as the Outer Continental Shelf Lands Act recognize the prior possessory interests of Alaska Natives to offshore ice and water areas which they have traditionally used and occupied. These aboriginal claims survived the passage of the Claims Settlement Act because that Act does not contain the plain and unambiguous language needed to extinguish them. Accorded all the respect due a fee simple interest, these possessory interests preclude development of the off-shore lands they encumber.

II. Title VIII of the Conservation Act applies to the OCS in the event the Claims Settlement Act is construed as extinguishing aboriginal title to that area. Alaska Natives agreed to the passage of the Claims Settlement Act based on the representation that their subsistence uses on affected lands would be protected. Title VIII fulfills that promise. In language taken from a draft of the Claims Settlement Act, it applies to precisely the same lands and waters as does the Claims Settlement Act. If the Claims Settlement Act applies to the OCS, so does the Conservation Act.

III. If the Conservation Act applies to the OCS, Interior must comply with Section 810 before leasing public lands. The plain language of the statute dictates that compliance precede leasing. The legislative history and purposes of the Act also support Section 810's application at the lease sale stage.

IV. An injunction is the appropriate remedy for violations of Section 810. Traditional equitable principles—the probability of success on the merits, the balance of hard-

ships, and the public interest—favor the grant of injunctive relief. The plain language of the statute requires one. Section 810 represents a congressional determination that leasing decisions cannot be made, and leases cannot be issued, until Interior has fully complied with procedures designed to incorporate subsistence needs into all leasing decisions. The only available remedies for a violation of Section 810 are an order voiding the sale or an order enjoining exploration until the Secretary achieves compliance, if that is possible as a factual matter.

V. Finally, the claim that Section 810 should not be retroactively applied to the Norton and Navarin Basin Sales, even if the Act generally applies to OCS leasing, must be rejected on factual grounds. The record demonstrates that this case does not involve a retroactive application of the Conservation Act.

ARGUMENT

I. ALASKA NATIVES HOLD ABORIGINAL TITLE TO PORTIONS OF THE OCS.

The court of appeals found that the Claims Settlement Act extinguished aboriginal title to the ice and waters traditionally used and occupied by Alaska Natives. This decision is irreproachable to the extent it consistently applies the Claims Settlement Act and Title VIII. If the Claims Settlement Act applies to OCS lands and waters, so does the Conservation Act. Yet the obverse of this proposition is equally true. If the Conservation Act does not apply to OCS lands and waters, neither does the Claims Settlement Act. In this case Alaska Natives hold aboriginal title to OCS lands they have traditionally used and occupied.

The law of aboriginal title was originally developed by Chief Justice John Marshall in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823). That decision found that when European governments "discovered" the United States, they asserted paramount sovereignty to this land, obtain-

ing a fee title good against all other European governments. 21 U.S. (8 Wheat.) at 572-79. But their title was not free of all encumbrances. The original Natives retained possessory interests by virtue of their use and occupancy—a right which has generally been described as "original Indian title," "aboriginal Indian title," or "Indian title."

Marshall reasoned that the legal rights conferred by aboriginal title flowed from these general principles. Because aboriginal title was an encumbrance on the sovereign's fee, it could only be transferred with the consent of the sovereign. Moreover, while aboriginal title was good against all third parties, it could be extinguished at will by the sovereign holding the fee. Finally, where the federal government was sovereign, aboriginal title was presumed valid unless specifically extinguished. 21 U.S. (8 Wheat.) at 591-92; *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 105 S.Ct. 1245, 1251 (1985).

Later cases developed the principle that federal law does not countenance penumbra extinguishments of aboriginal title. Because aboriginal title can be summarily extinguished, this Court has required that Congress unambiguously exercise its termination powers. It has held that congressional intent to extinguish Indian title "must be plain and unambiguous" as well as that a congressional decision to terminate aboriginal rights "cannot be lightly implied." *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 346, 354 (1941). *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979); *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968); *Pigeon River Co. v. Charles W. Cox Ltd.*, 291 U.S. 138, 160 (1934).

This Court has also held that aboriginal title appertains to interests in waters and submerged lands. The principle that Indians can hold title to interests in navigable streams and waters was first announced in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), where Justice Marshall found

that the Cherokee Nation held navigation rights to the Tennessee River. Four later cases affirm this decision, each finding that Native groups can hold aboriginal title to fishing rights in navigable waters. *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979); *Carter v. Hawaii*, 200 U.S. 255 (1906); *United States v. Winans*, 198 U.S. 371 (1905); *Damon v. Hawaii*, 194 U.S. 154 (1904).

Related cases provide that aboriginal use of water establishes title to the associated submerged lands. *Montana v. United States*, 450 U.S. 544, 550 at n.1 (1981). *See Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); *United States v. Holt State Bank*, 270 U.S. 49 (1926); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). Resolving competing tribal and state claims to submerged lands, these cases decide whether exceptional circumstances overcome the strong presumption that the United States does not convey an ownership interest in submerged lands held in trust for the states pursuant to the "equal footing" doctrine and applicable principles of constitutional law. *See Oregon ex. rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). Although each of these cases ultimately disposes of the tribal claims differently, depending on their individual facts, they collectively find that aboriginal use of navigable waters by Native tribes and bands gives rise to aboriginal title claims to the associated submerged lands.

These principles find that Alaska Natives hold aboriginal title to those portions of the Alaskan OCS which have served as their traditional hunting and fishing grounds. No aboriginal group has used the coastal water and ice as extensively as the Eskimo. For about half the year, water up to 65 miles from the Arctic coast is frozen solid. The resulting ice areas resemble the tundra, permitting the Eskimo to treat the ice as land. They set up camps on the ice. They build roads on it. And, most importantly,

they hunt and fish on it.[20] In addition, the Eskimo have traditionally secured the majority of their resources from ice and water. Because the tundra is largely devoid of natural resources, the Eskimo have traditionally relied on the sea for food, clothing, fuel, and the basic materials for making hunting equipment such as kayaks and harpoons.[21] As a result of their profound reliance on the sea, the Eskimo do not sharply distinguish between land and water. As put by one commentator:

> The use of coastal ice and water by Alaska's Native people is remarkable—greater than their use of land in some major areas. Beyond the quantity of their use, their methods of use were exceptional. Whether it was Eskimo use of ice in the North, Aleut use of water on the Chain, or Tlingit activity on the fjords of the South, lives were so centered on the water that the lines which we imagine separate land from water disappeared.

K. Josephson, ALASKA AND THE LAW OF THE SEA: USE OF THE SEA BY ALASKA NATIVES—A HISTORICAL PERSPECTIVE 91 (1974).

This use and occupancy gives rise to cognizable claims to coastal lands and water. This Court has previously recognized that Alaska Natives hold aboriginal title to areas they have traditionally used and occupied. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). For almost half a century Interior has taken the position that this title extends to all waters and submerged lands over which the United States asserts sovereignty. *Aboriginal Fishing Rights in Alaska*, 57 Interior Dec. 461 (1942). Based on precedent issued by this Court, this controlling authority flatly holds that the use of coastal ice and water "estab-

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[20] R. Nelson, HUNTERS OF THE NORTHERN ICE (1969).

[21] *Id.*; N. Chance, THE ESKIMO OF NORTH ALASKA 9 (1966)

lishes possessory rights in Alaskan waters and submerged lands." 57 Interior Dec. 461, 476.

The United States recognized these possessory rights when it extended paramount sovereignty over the OCS. In 1953 the federal government enacted the OCSLA, asserting jurisdiction and control over the OCS, and claiming title to all mineral interests in those lands. But this extension of federal power did not secure to the United States unfettered rights and interests. Pursuant to the principles of international and federal common law announced by Chief Justice Marshall in *Johnson v. McIntosh*, Alaska Natives retained a subordinate possessory interest based on their prior occupancy and use. This principle is expressly recognized by the OCSLA. The Act states that it does not "affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to" its provisions. 43 U.S.C. § 1342. Confirming this plain language, the accompanying legislative history states that this savings clause applies to rights, such as aboriginal title, which were recognized as a matter of federal law and policy after the United States acquired sovereign control pursuant to the doctrine of discovery. The House Report makes this point as follows:

> [The Act] asserts Federal jurisdiction and control over the Continental Shelf areas beyond original State boundaries, thus bringing the lands and resources within such areas into the same legal status as those acquired by the United States through cession or annexation; in the alternative, *such lands and resources are subject to the doctrine of discovery. Adherence to the policy heretofore observed in connection with similar lands and resources brought under national dominion requires, as a matter of policy and law, that the property rights of individuals in and to such lands and resources be recognized and confirmed.*

H.R. Rep. No. 695, 82d Cong., 1st Sess., *reprinted in* 1953 U.S. Code Cong. & Ad. News 1395, 1411 (emphasis added).

These aboriginal claims to coastal waters and submerged lands were not extinguished when Congress passed the Claims Settlement Act in 1971. To abolish aboriginal title, Congress must consciously decide to terminate that subordinate interest, consciously address the nature and scope of the termination, and then craft a statute whose language plainly and unambiguously expresses its decisions. The Claims Settlement Act fails this test. It contains no language "plainly and unambiguously" extinguishing aboriginal title on the OCS. The Act merely terminates Indian title to lands "situated in Alaska," a phrase susceptible of two interpretations. Used in a technical sense, it describes the area lying within the territorial boundaries of the State of Alaska. Used in a geographical sense, it describes the area lying outside as well as inside the marginal sea. Both senses are natural, and, *a priori*, no reason exists to prefer one to another.

Nor does the legislative history of the Claims Settlement Act "plainly and unambiguously" indicate that Congress intended to extinguish these possessory interests. The great weight of that history indicates that the Act does not apply to the OCS. Committee Reports on the bill repeatedly state that the extinguished aboriginal claims were intended to apply "to the lands which now comprise the State of Alaska." *E.g.*, S. Rep. No. 925, 91st Cong., 2d Sess. 46, 47 (1970); H.R. Rep. No. 523, 92d Cong., 1st Sess. (1971). During consideration of the bill, members of Congress, as well as a representative from Interior, consistently expressed the belief that it only extinguished aboriginal claims to "the entire State of Alaska," or a maximum of "375 million acres [of Alaska]."[22] No one voiced the opinion that

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[22] *E.g., Alaska Native Land Claims: Hearings Before the House Subcommittee on Indian Affairs on H.R. 3100, et al.*, 92d Cong. 1st Sess.

the Act would apply to anything other than lands lying within Alaska's territorial boundaries.

In the face of this overwhelming authority to the contrary, the court of appeals concluded that the Claims Settlement Act applied to the OCS. It reached this conclusion largely on the basis of a single inconsequential sentence uttered by an oil industry spokesman at a Senate hearing held two years before a different Congress passed the Claims Settlement Act. An early draft of the Claims Settlement Act extinguished "aboriginal right, title, use, or occupancy of lands *in Alaska*." S. 1830, 91st Cong., 1st Sess. § 3(a) (April 15, 1969); H.R. 10193, 91st Cong., 1st Sess. § 3(a) (1969). Before both a House Subcommittee and a Senate Committee, a representative of the oil industry proposed amending the phrase to read "lands, waters, and submerged areas in Alaska."[23] On its face this amendment did not affect the geographic scope of the extinguishment, for the phrase "submerged areas" was limited by the following prepositional phrase "in Alaska." In comments to the Senate Committee (not to the House Subcommittee), the industry spokesman mentioned, by way of background, that the State of Alaska owned submerged land and that the federal government "held title" to the OCS. *1969 Senate Claims Settlement Hearings* at 140. Two years later a different Congress enacted Section 4(b) of the Claims Settlement Act, a section which extinguishes

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(1971) at 370 (statement of Harrison Loesch, Assistant Secretary of the Interior), 65 (statement of Rep. Aspinall), and 340 (statement of Rep. Begich). *See also, e.g.*, 117 Cong. Rec. 36,854 (1971) (statement of Rep. Aspinall); 117 Cong. Rec. 38,443 (1971) (statement of Sen. McGovern); 117 Cong. Rec. 38,445 (1971) (statement of Sen. Harris).

[23] *Alaska Native Land Claims: Hearings Before Senate Committee on Interior and Insular Affairs on S. 1830*, 91st Cong., 1st Sess. at 149 (1969) [hereinafter *1969 Senate Claims Settlement Hearings*]; *Alaska Native Land Claims: Hearings Before the House Subcommittee on Indian Affairs on H.R. 13142 and H.R. 10193*, 91st Cong., 1st Sess., Part I, at 318 (1969).

"All aboriginal title in Alaska . . . including submerged land . . . both inland and offshore." 43 U.S.C. § 1603(b). The court of appeals found that this passing reference to the OCS in the Senate hearing indicated a congressional intent to apply the Claims Settlement Act to that area.

The court of appeals erred in reaching this conclusion. The strongest proposition supported by the legislative history is that Congress might have extinguished aboriginal title to OCS lands had it considered the issue. The oil industry would have favored extinguishing all Native claims, and this proclivity might have been shared by those federal officials responsible for developing federal lands. Moreover, those Alaska Natives represented by former Chief Justice Arthur Goldberg indicated a willingness to entertain proposals that included extinguishing all rights based on aboriginal title. *See 1969 Senate Claims Settlement Hearings* at 301. Yet this idle speculation cannot substitute for a plain and unambiguous expression of congressional intent. The invariant and prevailing rule is that Congress must "plainly and unambiguously" express its intent to extinguish aboriginal claims. If it neglects a particular claim when passing termination legislation, the resulting legislation cannot be construed as extinguishing that right. The parameters of the extinguishment are set by the congressional selection of the claims to be terminated, not by the penumbra cast by those selections.

For wholly different but equally compelling reasons, aboriginal title to OCS lands and waters is not extinguished by the exercise of paramount federal sovereignty. The "paramountcy" argument hopelessly confuses the controlling law of aboriginal title. Assertions of paramount federal sovereignty complement rather than conflict with aboriginal title claims. Derived from prior occupancy, aboriginal title is a federally-recognized right which is never negated by paramount federal power. *E.g.*, F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 486-93 (1982 ed.). Decisions issued by this Court illustrate precisely this point. Although

the federal government exercised complete (rather than paramount) sovereignty as well as ownership over the territories which later became the western states, aboriginal title was fully protected on these lands. Those possessory claims survived statehood and were found to have been extinguished only by treaty or an act of Congress specifically terminating them. *E.g., United States v. Shoshone Tribe*, 304 U.S. 111, 117-18 (1938).

Since Alaska Natives hold aboriginal title to coastal areas which they have traditionally used and occupied, Interior is precluded from leasing areas subject to these encumbrances. "Considered as sacred as the fee simple of whites," the aboriginal title of Alaska Natives is entitled to the same protection offered a fee simple interest. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835). Until such time as Congress extinguishes aboriginal title to the Alaskan OCS, Interior can neither disrupt the hunting and fishing activities of Alaska Natives nor lease lands to which they claim title. *Jones v. Meehan*, 175 U.S. 1 (1899). In the meantime, it must limit leasing to those substantial areas not historically used by Alaska's Native peoples.

II. TITLE VIII OF THE CONSERVATION ACT APPLIES TO THE OCS IN THE EVENT THE CLAIMS SETTLEMENT ACT EXTINGUISHED ABORIGINAL TITLE TO OCS LANDS AND WATERS.

The history and purposes of Title VIII demonstrate that it applies to the same lands and waters as does the Claims Settlement Act. Alaska Natives agreed to have Congress extinguish their aboriginal claims based on the understanding that their subsistence uses on affected lands would be protected. If the Claims Settlement Act applies to the OCS, so does Title VIII.

This conclusion is appropriate in light of the canon of statutory construction governing interpretations of Title VIII. This Court has consistently held that ambiguities in statutes passed for the benefit of indigenous people must

be resolved in favor of those people. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918). This canon is fully applicable to the Conservation Act. Not only is Title VIII of the Conservation Act Indian legislation, its legislative history reveals a congressional intent that this canon control the resolution of controversies arising from its implementation. Representative Udall, the chief sponsor of the Conservation Act, explained this intent just prior to the final House vote adopting the Conservation Act:

> While the [Conservation Act] obviously is not Indian legislation in its entirety, the subsistence title and the other subsistence related provisions are. And under well-recognized canons of statutory construction, any ambiguities in the title and other provisions must be resolved in favor of the Alaska Native people.

126 Cong. Rec. 29,279 (November 12, 1980).

While acknowledging that Title VIII of the Conservation Act is inextricably linked to the Claims Settlement Act, the Secretary and the oil companies contend that the two statutes should be construed inconsistently. They claim that the Conservation Act does not apply to OCS oil and gas leases because those interests do not fall within the Act's definition of "Federal lands" or "Public lands."

A. Oil And Gas Leases In The OCS Are "Federal Lands." The United States Unquestionably Holds Title To These "Interests," And The Congress Asserts Title To OCS Lands For Purposes Of Domestic Legislation, In The Conservation Act As Elsewhere.

The claim that oil and gas leases do not fall within the purview of the definition of "Federal lands," presented

neither in *Gambell I* nor *Gambell II*,[24] depends on a suppression of the most pertinent portion of that statutory definition. The Secretary and the oil companies correctly argue that Section 102(2) of the Conservation Act defines "Federal lands" as "lands the title to which is in the United States after December 2, 1980." 16 U.S.C. § 3102(2). They further argue, again correctly, that the term "Public lands" is defined as "lands situated in Alaska which, after December 2, 1980, are Federal lands." 16 U.S.C. § 3102(3). Here they stop. Either by design or oversight, they neglect to mention that the statute defines "lands" broadly, sweeping within its ambit *"interests"* in lands and waters. Distinguishing and differentiating between lands and "interests" in lands, Section 102(1) of the Conservation Act defines "lands" as "lands, waters, *and interests therein.*" 16 U.S.C. § 3102(1) (emphasis added).

Section 102(1)'s definition of "lands" establishes that oil and gas leases are "Federal lands." When read together, Sections 102(1) and 102(2) provide that "interests to which the United States holds title" are included within the definition of "Federal lands." Oil and gas leases to OCS lands are unquestionably interests to which the United States holds title. The word "title" merely connotes an ownership right. *E.g.*, BLACK'S LAW DICTIONARY. All relevant authority provides that the United States owns the mineral resources of the Outer Continental Shelf. The most pertinent of these is the OCSLA. That Act provides that the subsoil and seabed of the OCS are subject to the United States' jurisdiction, control, and disposition. 43 U.S.C. § 1332(1). It further provides that the OCS is a "vital national resource reserve" that is "held" by the United States. 43 U.S.C. § 1332(3). This ownership has been lu-

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[24] Since neither the Secretary nor the oil companies raised this issue in the court of appeals, the tribal villages are puzzled as to why they argue it here. *E.g., Berkemer v. McCarty*, 468 U.S. 420, 443 (1984); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

crative: since the OCSLA's implementation in 1953, the United States has received over $70 billion in royalties and bonuses from oil and gas leasing on the Shelf.[25] *See also* H.R. Rep. No. 590, 95th Cong., 2d Sess. 54, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1450, 1461 ("The lands of the Outer Continental Shelf . . . *belong* to the Federal Government") (emphasis added); *1969 Senate Claims Settlement Hearings* at 140 (oil industry claim that United States "holds title" to the OCS).

Moreover, OCS oil and gas leases would be "Federal lands" even if the statutory definition did not include "interests" in lands. Congress routinely asserts that the United States holds title to the OCS for purposes of domestic legislation, ignoring the legal niceties which surround the status of the United States' dominion over the OCS in the international arena. Two examples of this congressional treatment of OCS lands can be found in the Federal Lands Policy and Management Act (FLPMA) and the Archaeological Resource Protection Act (ARPA). FLPMA, like the Conservation Act, defines the term "public lands." By specifically excluding OCS lands from the class of lands owned by the United States, it indicates that, for purposes of domestic legislation, Congress treats the OCS as though it were owned in a conventional sense. FLPMA provides that: "Public lands means: *Any land and interest in land owned by the United States . . . except:* (1) *lands located on the Outer Continental Shelf;* and (2) lands held for the benefit of Indians, Aleuts, and Eskimos." 43 U.S.C. § 1702(e) (emphasis added).

The Archaeological Resource Protection Act provides yet another example of this congressional treatment of OCS lands. Like the Conservation Act, the ARPA defines "public lands" as those lands the fee title to which is held by the United States. Yet unlike the Conservation Act, the

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[25] Pendley, *Development of the Exclusive Economic Zone*, Vol. 2, No. 1, A.B.A. NATURAL RESOURCES & ENVIRONMENT 29 (1986).

ARPA excepts OCS lands from this definition. Illustrating once again that Congress routinely assumes that the United States holds title to the Outer Continental Shelf, as well as that Congress possesses the capacity to exempt the Outer Continental Shelf from the workings of a statute when it so desires, the ARPA defines "public lands" as:

> (A) lands which are owned and administered by the United States as part of—(i) the national park system, (ii) the national wildlife refuge system, or (iii) the national forest system; and
>
> (B) all other lands *the fee title to which is held by the United States, other than lands on the Outer Continental Shelf* . . .

16 U.S.C. 470bb(3) (emphasis added).

While these examples suggest that Congress no doubt understood that the Conservation Act's definition of "Federal lands" included the OCS, the Conservation Act itself provides compelling evidence that this was indeed the congressional understanding. The proof is provided by Section 1001. 16 U.S.C. § 3141. Section 102's definition of federal lands is generally important only for Title VIII, for the geographic scope of other titles generally does not depend on this definition. The scopes of these titles are controlled by other sections of the United States Code, are established by maps, or, as in the cases of Titles IX and XIV, are expressly not dependent upon Section 102's definition. Section 1001 is an exception to this rule. It uses Section 102's definition, plainly providing that "Federal lands" include OCS lands. It states:

> The Secretary shall initiate and carry out a study of *all Federal lands (other than submerged lands on the Outer Continental Shelf)* in Alaska north of 68 degrees north latitude. . . .

16 U.S.C. § 3141(a) (emphasis added). By specifically excepting OCS lands from the definition of "Federal lands,"

Section 1001 compels the conclusion that OCS lands are "Federal lands" for Conservation Act purposes.

B. Oil And Gas Leases In The OCS Are "Public Lands" If The Claims Settlement Act Extinguished Aboriginal Title To The OCS: The Language Of The Two Statutes Is Virtually Identical, And Title VIII Was Expressly Intended To Apply To All Lands Affected By The Claims Settlement Act.

After finding that the Claims Settlement Act applied to the OCS, the court of appeals found that the Conservation Act likewise applied to this area. Its conclusion was based largely on the legislative history of the Conservation Act, which showed that the definition of public lands was intended to cover all lands to which the Claims Settlement Act extinguished title.

The Claims Settlement Act contained no provisions protecting subsistence uses. The initial drafts of the Act embodied the framework of the eventual settlement: the extinguishment of aboriginal title in exchange for money, fee title to fewer lands, and protections for subsistence uses.[26] Although none of the subsistence provisions were adopted, their rejection did not reflect congressional indifference. The Conference Committee represented that "all Native interests in subsistence resource lands can and will be protected by the Secretary through the exercise of his existing withdrawal authority." Conf. Rep. No. 746, 92d Cong., 1st Sess. 37, *reprinted in* 1971 U.S. Code Cong. & Ad. News 2247, 2250. To prod Interior into action, the Committee directed "both the Secretary and the State to *take any action necessary* to protect the subsistence needs of the Natives." *Id.* (emphasis added).

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[26] *See, e.g.*, S. 3859, 90th Cong., 2d Sess. (1968); H.R. 13142, 91st Cong., 1st Sess. (1969); S. 1830, 91st Cong., 1st Sess. (April 15, 1969); S.35, 92d Cong., 1st Sess. (1971); S. 835, 92d Cong., 1st Sess. (1971); H.R. 7039, 92d Cong., 1st Sess. (1971).

Congress did, however, address subsistence when it acted to meet its 1978 deadline for settling the legal status of 80 million acres of public lands in Alaska. The deadline was set by Section 17(d)(2) of the Claims Settlement Act. 43 U.S.C. § 1616(d)(2). That statute directed the Secretary of the Interior to withdraw up to 80 million acres of public lands—known as D-2 lands—and to recommend inclusion of these lands in National Parks, Forests, Wildlife Refuges, and Wild and Scenic River Systems. It then gave Congress five years to confirm these recommendations. Representative Udall introduced a D-2 lands bill pursuant to these provisions in 1977. H.R. 39, 95th Cong., 1st Sess. (January 4, 1977). The bill designated lands as D-2 conservation units and provided some rudimentary protections for subsistence uses on those lands.

Alaska Natives found that the proposed bill did not adequately protect subsistence uses. Pointing out that Interior had failed to provide the protections promised by the Claims Settlement Act Conference Report, they objected to the substance as well as the geographic scope of the legislation. To remedy its substantive inadequacies, the Alaska Federation of Natives (AFN) and other Native groups advocated strengthening the subsistence provisions. AFN proposed adding provisions which Congress had previously deleted from the Claims Settlement Act.[27] Since Interior had failed to adequately provide for subsistence uses, Congress proved receptive to the proposal. It ultimately incorporated many of its provisions—including what is now Section 810—in Title VIII. *Compare* S. 835, 92d Cong., 1st Sess. § 16(b)(1) (1971) *and* H.R. 7039, 92d Cong., 1st Sess. § 16(b)(1) (1971) *with* 16 U.S.C. § 3120(a).

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[27] *Inclusion of Alaska Lands in National Park, Forest, Wildlife Refuge, and Wild and Scenic River Systems: Hearings on H.R. 39 et al. Before the Subcommittee on General Oversight and Alaska Lands*, 95th Cong., 1st Sess., Part XII at 52-56, 461-75, 489-97 (1977) [hereinafter 1977 House Alaska Lands Hearings].

Alaska Natives also advocated extending the geographic scope of the subsistence title. The subsistence title of the initial D-2 legislation only applied to the lands withdrawn by other sections of the bill. Alaska Natives objected to this limitation, contending that the subsistence title should confirm the subsistence rights guaranteed them in the Conference Report accompanying the Claims Settlement Act. The AFN's position was that, in order to fulfill its obligations under the Claims Settlement Act, Congress had to apply the subsistence title to all lands to which that Act had extinguished title. Mr. Byron Mallot, speaking for AFN, testified that:

> The Alaska Federation of Natives believes this legislation should confirm the subsistence rights of the Alaska Natives, not just to the D-2 lands, but, as Congress plainly intended when it wrote its [Claims Settlement Act] conference report, to all Native subsistence *uses on all Federal public lands*. . . .

1977 House Alaska Lands Hearings, Part XII at 53, 463 (emphasis added).

The AFN proposed amending the D-2 legislation so that the geographic scope of the subsistence title was severed from the geographic scope of the D-2 titles. The mechanism for severing the subsistence title from the D-2 titles was a proposed definition of "public lands." Borrowing language directly from the Claims Settlement Act, the AFN proposed defining public lands as "all Federal lands and interests therein situated in Alaska." *Id.* at 491. *See* 43 U.S.C. § 1602(e). It further proposed extending the geographic scope of the subsistence title to all "public lands." *1977 House Alaska Lands Hearings* at 53, 463. Under its amendments, the D-2 withdrawals would continue to be described by maps, but the subsistence title would apply to all public lands traditionally used by Alaska

Natives for subsistence purposes prior to the passage of the Claims Settlement Act.[28]

The Subcommittee which had received Mr. Mallot's testimony responded swiftly to the AFN's amendment. It passed out of committee legislation incorporating the proposals in early 1978. H.R. 39, 95th Cong., 1st Sess. (Feb. 15, 1978). The legislation severed the subsistence title from the D-2 titles and extended the geographic scope of the subsistence title to all public lands. As suggested by the AFN proposal, these changes were effectuated by adopting AFN's definition of "public lands." *Id.* at Sec. 103. As demonstrated by the following comparison, the AFN definition of "public lands" became Section 102(2):

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[28] The oil companies allege that the AFN subsistence proposal did not include the OCS because it only applied to public lands "located within the exterior boundaries of each of the twelve regional corporations." The argument actually establishes that Title VIII applies to the OCS, since Congress rejected this limitation and extended the subsistence protections to all public lands. Its relevance is otherwise obscure. The boundaries of the regional corporations were commonly understood to include the OCS. (R-44 (Norton) Exhibit I). Moreover, the AFN proposed legislation is unclear as to whether the restrictive phrase "included within the exterior boundaries of each of the twelve regional corporations" applied to public lands or merely to Native lands. The plain language suggests the limitation applied only to the latter.

AFN Proposal	16 U.S.C. § 3102(3)
"Public Lands" means all Federal lands and interests therein situated in Alaska as of the effective date of this Act, except: . . . (2) land selections of the State of Alaska which have been patented or tentatively approved . . . (3) land selections made under ANCSA and not yet conveyed by the Secretary to an ANCSA corporation, unless determined to be invalid, and (4) lands covered by ANCSA section 19(b).	The term "public lands" means land situated in Alaska which, after the date of enactment of this Act, are Federal lands, except— (A) land selections of the State of Alaska which have been tentatively approved or validly selected . . . (b) land selections of a Native Corporation made under [ANCSA] which have not been conveyed to a Native corporation, unless any such selection is determined to be invalid . . . and (C) lands referred to in section 19(b) of [ANCSA].

The adoption of the AFN's definition ensured that the geographic scope of Title VIII is congruent with that of the Claims Settlement Act. The definition was proposed for the express purpose of protecting subsistence uses on all federal lands to which the Claims Settlement Act had extinguished title. Its language is drawn directly from that Act, for it, like the Claims Settlement Act, defines public lands as "all Federal lands and interests therein situated in Alaska." *Compare* 16 U.S.C. § 3102(1)-(3) *with* 43 U.S.C. § 1602(e). In light of the amendment's express purpose and plain language, its acceptance unquestionably demonstrates that Congress intended to apply the subsistence title of the Conservation Act to all lands affected by the Claims Settlement Act.

Although the legislative history of the Conservation Act does not speak directly to this point, the congressional response to AFN's "public lands" definition strongly sug-

gests that Congress understood that the definition extended the geographic scope of the subsistence title to the OCS. As soon as Congress adopted AFN's definition of public lands, it amended the Conservation Act's savings clause to include the Fishery Conservation and Management Act of 1976. *Compare* H.R. 39, § 701(g), 95th Cong., 1st Sess. (October 12, 1977) *with* H.R. 39, § 716(4), 95th Cong., 2d Sess. (October 15, 1978). With very few exceptions, the Fishery Management Act applies to waters lying between three and two hundred miles offshore. 16 U.S.C. §§ 1801, 1811-12. The Conservation Act could not affect the Fishery Management Act unless it applied beyond the territorial sea. Congress had found no reason to include the Fishery Management Act in the Conservation Act's savings clause before the geographic scope of the subsistence title was extended to all public lands. Its decision to add the Fishery Management Act to the savings clause immediately after adopting AFN's definition of public lands is consistent with a congressional understanding that the term included lands and waters lying outside the boundaries of the marginal sea.

Other pertinent legislative history indicates that the sponsors of the Conservation Act fully understood that the geographic scope of the subsistence title differed from that of the D-2 titles. While the geographic scope of Title VIII was set by the definition of public lands, the coverage of the D-2 titles was delineated by individual maps specifying the lands to be withdrawn. These maps rarely included portions of the OCS. *See, e.g.*, National Wildlife Refuges in Alaska; Description of Boundaries, 48 Fed. Reg. 7,890, 8,017 (February 24, 1983). As evidenced by the numerous comments cited by the Secretary and the oil companies, supporters of the D-2 lands bill continually assured Congress that the D-2 titles would not affect OCS leasing. *See Fed. Pet. Brief* at 40-41. In every instance the representations as to the limited geographic scope of the bill referred to the D-2 titles. In no instance did any member

of Congress make a similar representation as to the scope of Title VIII, though they presumably had the incentive to do so. Their silence evidences a congressional understanding that the subsistence title applied to OCS leasing.

In fact, statements concerning the geographic scope of the D-2 land withdrawals, made during the floor debates, indicate that the prevailing impression was that the term "in Alaska" was geographically descriptive and included the OCS. This understanding was expressed by Representative Udall, the chief sponsor of the Conservation Act, who remarked that "Offshore in Alaska there are 203 million acres of sedimentary basin." 125 Cong. Rec. 9,900 (1979). His use of the term was echoed by Representative Young of Alaska, a member of the House Interior Committee and its Subcommittee on General Oversight and Alaska Lands. Mr. Young also indicated that "in Alaska" extended to offshore waters, stating that "The person who supports offshore drilling in Alaska first over onshore drilling is doing a great disservice to the environment." 125 Cong. Rec. 9,907 (1979). *See also* 126 Cong. Rec. 11,124 (1980) (Senator Cranston) ("we can still meet our need to develop oil and gas in Alaska").

In this regard, the proposition that "in Alaska" would be used most naturally in its geographically descriptive sense is established by the fact that Interior and the oil companies have previously espoused exactly that position. To defeat aboriginal claims to the OCS in the *Inupiat Community* case, both claimed that the term included the OCS. Interior ventured that interpreting the term as only including the territorial sea would be "tortured." The oil companies were more eloquent. They argued:

> Plaintiffs' [the Inupiat Communities'] insistence (p. 65) that the words "in Alaska" in ANCSA be read in their most narrow possible sense is betrayed by their own habitual use in other contexts of the same phrase encompassing the areas

> they claim [the Outer Continental Shelf]. . . . On plaintiffs' own theory as to the restricted meaning of the phrase, all these authorities, and many more, are irrelevant to their claims. *But the less guarded usage, both by plaintiffs and by Congress in ANCSA, is a perfectly natural one.*

Memorandum in Support of Motion of Defendants AMOCO Production Co. for Judgment on the Pleadings at 102 (emphasis added). This argument is as applicable to the Conservation Act as it is to the Claims Settlement Act. If it was "perfectly natural" for Congress to use the term "in Alaska" in a geographically descriptive sense when it passed the Claims Settlement Act, it was "perfectly natural" for Congress to use the word in the same sense when it passed the Conservation Act some nine years later.

III. THE SECRETARY MUST COMPLY WITH SECTION 810 BEFORE LEASING PUBLIC LANDS.

The court of appeals correctly determined that Section 810's language and legislative history required that the Secretary comply with Section 810 before leasing public lands. The requirements of Section 810(a) are set out in two sentences. The first applies before any leasing decisions are made. It requires that the Secretary prepare baseline as well as impact studies, and that he consider alternatives which would reduce or eliminate the need to lease. The second sentence precludes the issuance of any lease which would significantly restrict subsistence uses until he gives notice, holds hearings, and makes the findings required by Section 810(a)(1)-(3).

The Secretary and the oil companies concede that Interior violated the first sentence of Section 810(a) and contend that it need not comply with the second. They base this latter claim on two documents which were prepared after the court of appeals decided *Gambell I* and which were published after the tribal villages subsequently moved for a preliminary injunction. Legal justifications

rather than analyses, the post-sale evaluations find that not one of more than 3700 oil and gas leases to 26.4 million acres of OCS lands triggered the notice, hearing, and findings required by the second sentence of Section 810(a). (Fed. Pet. App. 81a, 107a). The argument is that the second sentence does not apply at the lease sale stage due to the uncertainties of oil and gas exploration and the lack of direct physical impacts attributable to leasing. Under this theory, since Interior can only conclude that a lease "would [in fact] significantly restrict" subsistence uses after exploration proves that the tract contains commercially exploitable quantities of oil and gas, the Secretary need never comply with Section 810(a) at the lease sale stage. *Id.*

As an initial matter, Interior's post-sale evaluations must be rejected on scientific grounds because they are based on inadequate and unreliable information. Since the Secretary and the oil companies concede that Interior failed to prepare adequate baseline and impact studies,[29] they

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[29] Neither the Secretary nor the oil companies has petitioned for review of the lower courts' determination that Interior violated the first sentence of Section 810 when holding the Norton and Navarin sales. In the courts below, the Secretary and the oil companies claimed that Interior had "inadvertently complied" with the first sentence. Alleging that the Conservation Act required no more than that demanded by the NEPA and the OCSLA, they contended that compliance with these statutes assured compliance with the Conservation Act. Both courts rejected this claim on legal grounds, reasoning that since the Conservation Act was intended to supplement existing statutes, it could not be interpreted as demanding less. (Fed. Pet. App. 37a-38a; 9a-12a). The courts also could have rejected the argument on factual grounds. The record demonstrates that Interior failed to complete the studies and perform the analyses contemplated by the first sentence of Section 810 with respect to both sales. For example, at the time Lease Sale 57 was held, no baseline information regarding subsistence uses in Norton Sound was available. Comprehensive subsistence baseline studies of Native subsistence villages in Norton Sound and the Bering Sea areas were not published until January and June of 1984, more than

cannot credibly argue that the post-sale evaluations are accurate. The validity of the post-sale evaluations depends upon reliable subsistence impact studies. If the subsistence impact studies are inadequate, Interior's post-sale evaluations must likewise be inadequate.

The court of appeals did not reach this adequacy question because it ignored the post-sale evaluations. Its treatment of the documents fully comports with applicable principles of administrative law. Prior decisions of this Court teach that Secretary Hodel cannot rely on post-sale evaluations to rationalize why Secretary Watt and Secretary Clark failed to comply with the mandates of Section 810. This Court has long held that "a simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962), *quoting SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Administrative actions must be supported by contemporaneous explanations. They cannot be justified by litigation documents which serve as *post-hoc* rationalizations for actions which are otherwise unlawful. *Camp v. Pitts*, 411 U.S. 138, 142-3 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971). Applied here, this rule precludes Interior from using post-sale evaluations to advance new and different reasons justifying why Secretary Watt and Secretary Clark refused to comply with the second sentence of Section 810 when holding the Norton Sound and Navarin Basin lease sales.

Finally, assuming that the post-sale evaluations are part of the administrative record—which clearly they are not—their conclusions that Section 810 does not apply to leasing

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a year after the sale. *See* JORGENSEN, *supra* n. 11; LITTLE AND ROBBINS, *supra* n. 5.

should be rejected for the reason that they conflict with Section 810's language and purposes. The language of Section 810(a) is particularly compelling on this point. Its use of the word "lease" removes all doubt that it applies to leasing. The second sentence provides:

> *No such . . . lease . . . which would significantly restrict subsistence uses shall be effected until* the head of such Federal agency [gives notice, holds hearings and] determines that (A) such a significant restriction of subsistence uses is necessary, . . . (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

16 U.S.C. § 3120(a)(1)-(3) (emphasis added).

The rationale of *Secretary of the Interior v. California*, 464 U.S. 312 (1984), holds that the congressional decision to insert the word "lease" in Section 810(a) indicates that Congress intended for that section to apply at the lease sale stage. In *Secretary of the Interior*, this Court decided that Section 307(C)(1) of the Coastal Zone Management Act did not require Interior to make a consistency determination at the lease sale stage. 464 U.S. at 315. Its holding was based on the fact that the CZMA did not contain the word "lease" or "leasing," and that its legislative history showed that Congress had explicitly rejected attempts to put those words into Section 307(C)(1). *Id.* at 332-35. The logic of this decision mandates that the second sentence of Section 810(a) be interpreted as applying to leasing. If the critical factor is the word "lease," then the congressional decision to insert "lease" in Section 810(a) evidences a plain congressional intent to have that Section apply at the lease sale stage.

Contrary to the suggestion of the Secretary and the oil companies, the word "would" in the phrase "would significantly restrict" does not dictate a different result. "Would" is a modal auxiliary which has nearly two dozen different meanings, among which are "futurity," "uncertainty," and "probability." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981). Its meaning, in Section 810 as elsewhere, depends on the surrounding context.[30] For purposes of Section 810, this context is provided by the subject and predicate phrases "No such . . . lease . . . shall be effected." This language requires that "would" be given its natural and preferred meaning of "futurity." The Secretary claims he can never know whether a given lease "would in fact" significantly restrict subsistence uses. If "would" is interpreted to mean "would in fact," then the congressional directive that "No lease shall be effected" has no practical consequence. This is an impossible result. Congress used the word "lease" because it intended for Section 810(a) to apply to leasing decisions. Its intent cannot be wholly frustrated by a strained reliance on one of several equally probable uses of a modal auxiliary.

In this regard, the correct standard for determining when the Secretary must undertake the compliance effort envisioned by the second sentence of Section 810(a) is supplied by a host of court of appeals' decisions interpreting virtually identical language in the National Environmental Policy Act. The NEPA requires an environmental impact

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[30] The Court's decision in *INS v. Stevic*, 467 U.S. 407 (1984), stands for precisely this proposition. That case resolved whether the Refugee Act of 1980 changed the standard for deportation proceedings under the Immigration and Nationality Act (INA) from a clear-probability-of-persecution standard to a well-founded-fear-of-persecution standard. Although this Court noted in passing that the use of the word "would" in the INA suggested a probability, it based its holding solely on the context supplied by the surrounding words in the statute and the legislative history of the Refugee Act of 1980. It found no evidence of congressional intent to change the prevailing standard.

statement for all major federal actions "significantly affecting" the qualify of the human environment. 42 U.S.C. § 4332(2)(C). The courts of appeals have rejected arguments that the phrase "actions significantly affecting" means only those actions which "will in fact" significantly affect the human environment. They have held that when substantial questions are raised as to whether a project will have this effect, the agency must prepare an EIS. *E.g., Quinonez-Lopez v. Coco Lagoon Development Corp.*, 733 F.2d 1, 2 (1st Cir. 1984); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973); *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1320 (8th Cir. 1974); *Foundation for North American Wild Sheep v. United States Dept. of Agriculture*, 681 F.2d 1172, 1177-1178 (9th Cir. 1982). Since the NEPA's "significantly affecting" language connotes a higher level of certainty than Section 810's "would significantly restrict" language, this substantial question test sets a minimum standard for determining when the Secretary must comply with the second sentence of Section 810(a).[31]

Finally, the purposes of the Conservation Act demand that the second sentence of 810(a) be interpreted to apply at the lease sale stage. By enacting Title VIII of the Conservation Act, Congress sought to ensure that public land

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[31] The express language of section 810 strongly suggests that Congress intended that the standard for the "significant restriction" determination in Section 810 be triggered at least as easily as the parallel finding of "significant impact" under NEPA. It provides that whenever NEPA requires the Secretary to prepare an EIS he must give the notice, hold the hearings, and make the findings required by section 810(a)(1)-(3). It states:

> If the Secretary is required to prepare an environmental impact statement pursuant to [NEPA], he *shall* provide the notice and hearing and include the findings required by subsection (a) of this section as part of such [EIS].

16 U.S.C. § 3120(b) (emphasis added).

decisions "cause the least adverse impact possible" on Alaska Natives who depend on subsistence. 16 U.S.C. § 3112(1). It also wanted to ensure that management decisions affecting public lands be calculated to allow, to the maximum extent possible, the opportunity for rural residents engaged in a subsistence way of life to do so. *Id.*; 16 U.S.C. § 3111(5). Congress further sought to ensure that "rural residents who have personal knowledge of local conditions and [subsistence] requirements . . . have a meaningful role" in management decisions affecting fish and wildlife and the subsistence uses of those resources. 16 U.S.C. § 3111(5); § 3112(3); § 3115; § 3120 (a)(1)-(3).

These purposes can only be achieved if the second sentence of section 810 applies at the lease sale stage. Leasing is a critical stage in the OCS development process. Tract selections determine where exploration, development, and production will occur as well as which areas will be exposed to oil spills. Stipulations influence the flow of vessel traffic, the placement of platforms and drilling structures, and the location of on-shore construction facilities. Stipulations also dictate what equipment can be used and what training must be provided by lessees. Moreover, leasing constitutes an irrevocable commitment of resources. Although the Secretary retains broad control over exploration, development, and production activities under the OCSLA, once leases are sold, large sums of money change hands and extensive exploration projects are undertaken. As the First Circuit has recognized, "[e]ach of these events represents a link in a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues." *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983). The commitment is legal as well as bureaucratic. The OCSLA empowers the Secretary to cancel leases. But it does not authorize cancellation of leases on the basis of potential restrictions to subsistence uses. *See, e.g.*, 43 U.S.C. § 1334(a)(2)(A). Assuming that it did, the possibility of the Secretary actually taking such a step is

remote in light of the fact that cancellation would entitle the lessee to substantial compensation. 43 U.S.C. § 1334(a)(2)(C).

The critical nature of the lease sale stage requires that the second sentence of Section 810 apply at that stage. In the context of decisions involving the disposition of public lands in Alaska, Section 810's purposes are effectuated through the notice, hearings, and findings required by Section 810(a). Since the Secretary retains absolute and unfettered discretion over OCS development only at the lease sale stage, these requirements must be met at that stage if the purposes of the Act are to be fully implemented. Only at the lease sale stage can subsistence users become meaningfully involved in the decision-making process. Only at the lease sale stage can subsistence values be incorporated into the planning process. And only at the lease sale stage can the Secretary ensure that his proposed management decisions will cause "the least adverse impact possible" or that the "minimum amount of public lands" are leased. For this is the time when the Secretary possesses full authority to refuse to act where the benefits to be gained, though substantial, are outweighed by the risk of a significant restriction to subsistence uses.

IV. THE COURT OF APPEALS CORRECTLY DETERMINED THAT EXPLORATORY ACTIVITIES ON PUBLIC LANDS LEASED IN VIOLATION OF THE CONSERVATION ACT SHOULD BE ENJOINED.

After concluding in *Gambell I* that the Conservation Act applied to the Secretary's OCS leasing program, the court of appeals remanded this case to the district court for a determination as to whether the Norton Sound sale should be voided or whether exploration and development activities should be permanently enjoined until such time as the Secretary complied with the mandates of the Conservation Act. This order was a victory for Interior and the oil companies. The tribal villages had strenuously argued,

to both the motions and merits panel in *Gambell I*, that the only appropriate remedy for a violation of Section 810 was an order voiding the sale. *Gambell I*, 746 F.2d at 582. To avoid this result, Secretary Watt and the oil companies had represented that an injunction was the appropriate remedy. Both had argued that the proper remedy "would be the same as that ordered in *California v. Watt*: to enjoin further activities until the Secretary completes the procedures required by the statute." *Brief of ARCO Alaska* at 47-50; *Brief of Fed. Appellees* at 47-49. (To avoid discussion, relevant portions of these briefs are reproduced in their entirety in the appendix at 5a, 6a).

Having represented to the court that an injunction was the appropriate remedy for a violation of Section 810, Interior and the oil companies now claim that the court of appeals erred in reaching this conclusion. They argue that it ordered this remedy only because it applied a *per se* rule requiring the issuance of an injunction for every Section 810 violation. They further allege that the application of this alleged *per se* rule violates this Court's holding in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

Whether the court of appeals relied on a *per se* rule in this case is subject to question. On the one hand, its opinion expressly finds that the district court misapplied traditional equitable principles. *Gambell II*, 774 F.2d at 1416. On the other hand, when discussing the public interest, it suggests that, absent unusual circumstances, a refusal to enjoin a continuing violation of Section 810 would be an abuse of discretion. *Id.* at 1424-25. The difference is academic. The court of appeals would have been justified in finding either that traditional equitable principles required the issuance of injunctive relief under the special facts and circumstances of this case or that the Secretary's failure to comply with Section 810 warranted injunctive relief except under unusual circumstances.

A. The Tribal Villages Are Entitled To Injunctive Relief Under Traditional Equitable Principles.

Traditional equitable principles find that the tribal villages were entitled to injunctive relief. They were certain of success on the merits. The balance of hardships tipped decidedly in their favor. The public interest weighed heavily in favor of the injunction.

The balance of hardships unquestionably tipped in favor of the tribal villages, for neither the Secretary nor the oil companies demonstrated that they would suffer any irreparable harm if the injunction issued. In the Secretary's case this conclusion was axiomatic. Tacitly conceding that the government would suffer no harm if the courts authorized injunctive relief, the Secretary never alleged that the issuance of an injunction would irreparably harm any governmental proprietary interest. *Gambell II*, 774 F.2d at 1424-25. The conclusion was only slightly less compelling in the oil companies' case. Before the court of appeals, the oil companies' principal claim of harm was that, if the injunction issued, they would suffer financial losses attributable to the disruption of contracts signed after the court of appeals decided *Gambell I*. *Id.* at 1427. The harm was not judicially cognizable. A party cannot alter the balance of hardships by bootstrapping itself into a position of harm. *See, e.g., W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 767-70 (1983); *NLRB v. Sav-On Drugs, Inc.*, 728 F.2d 1254, 1256 (9th Cir. 1984) (*en banc*). Once the oil companies had notice of the business risks inherent in proceeding with exploration in the face of the Secretary's violation of the Conservation Act, their assumption of the risk could not alter the previously existing balance of hardships.[32]

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[32] The same reasoning precludes claims of financial losses attributable to the purchases of the leases since, as demonstrated at pages 49-50 *infra*, the oil companies were fully informed as to the risks inherent in proceeding with both sales.

In contrast, the tribal villages established that they would suffer irreparable harm should the injunction not issue. This Court has long recognized that violations of statutory prohibitions are judicially cognizable harms which must be considered in determining whether injunctive relief is appropriate. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 315 (1982); *TVA v. Hill*, 437 U.S. 153, 193-95 (1978); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975); *United States v. San Francisco*, 310 U.S. 16, 30-31 (1940). *See* Plater, *Statutory Violations and Equitable Discretion*, 70 Cal. L. Rev. 524 (1982). This harm is present here, for Interior's violations of Section 810 "poses the type of danger to the subsistence culture of Alaskan Natives that moved Congress to enact Section 810." *Gambell II*, 774 F.2d at 1424. Moreover, exploratory drilling and its associated activities pose real and significant dangers to the fish and wildlife forming the basis of the villages' subsistence economy. As demonstrated by Interior's own studies, noise attributable to airplanes, ships, and other mechanized traffic could effect reductions in the populations of whales, seals, walrus, and birds inhabiting the Norton Sound Basin.[33] As further demonstrated by these studies, oil spills attributable to exploratory drilling could prove devastating for Alaskan villages extremely dependent upon the subsistence economy.[34] Indeed, it was these

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[33] NORTON FEIS, *supra* n. 8, at 167-69, 177-80, 184-85.

[34] Interior forecast three major oil spills during the exploration and development stages and predicted that at least one would be of catastrophic proportions. NORTON FEIS, *supra* n. 8, at Table IV.A.4.b-1, 109. An oil spill could kill whales, *id.* at 188-89; seals and walrus, *id.* at 172-74; waterfowl, *id.* at 167-69; and fish populations, *id.* at 157-59. In its post-sale evaluation the agency altered this estimate to a 78% chance of one or more oil spills of 1,000 barrels or more during the development and production stage, but predicted none during exploration. (Fed. Pet. App. 81a). Any of these spills could be devastating for rural Alaskan villages. For example, a large oil spill could destroy the walrus haul out areas near St. Lawrence Island, a true disaster for the people of St. Lawrence Island who depend on subsistence re-

facts which led the court of appeals to conclude that the "by-products of oil and gas exploration such as potential oil spills, leakage, and noise" threatened to disrupt subsistence hunting and fishing to the extent that it could "destroy irreparably the isolated and unique culture of the Native Alaskans." *Gambell II*, 774 F.2d at 1426.

Finally, the public interest weighed heavily in favor of the injunction. Since Congress possesses the ultimate authority to order the nation's priorities, the best expression of the public interest is validly enacted legislation. Here that legislation requires the Secretary to follow the specific procedures set out by Section 810(a). If proper deference is accorded congressional authority, the public interest must be found to favor injunctive relief. As stated by the court of appeals:

> The district court's finding that the public interest favored oil exploration over the preservation of the subsistence culture of the Alaskan Natives violates the clearly expressed Congressional intent that lease sales *shall not* be conducted until the Secretary has evaluated the effect of the Oil Companies' activities on the subsistence uses and needs of Native Alaskans.

Gambell II, 774 F.2d at 1426 (emphasis in original). (Fed. Pet. App. 21a).

B. A Continuing Violation Of Section 810 Of The Conservation Act Warrants Injunctive Relief In The Absence Of Unusual Circumstances.

The court of appeals would likewise have been justified in issuing the injunction solely on the ground that the only available remedies for a violation of Section 810 are an order voiding the sale or an order enjoining exploration until compliance is achieved.

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sources for over 80% of their food. LITTLE AND ROBBINS, *supra* n. 5, at 294, 334, 343-44. *See also* JA 66-68; 73-80.

While the Constitution vests the power to interpret federal law in the judiciary, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and while the courts will not lightly imply a congressional intent to limit their power, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982), Congress can limit the exercise of the courts' discretion. *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944). Whether a given statute divests the courts of equitable discretion depends upon its language and purposes. The governing principle, as laid down by this Court, is that "[o]nce Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought." *TVA v. Hill*, 437 U.S. 153, 194 (1978). If the language and purpose of a given statute can only be effectuated by injunctive relief, the courts have no authority to withhold this remedy. In this instance, no "balancing of equities or . . . the invocation of the generalities of judicial maxims" is permitted. *United States v. San Francisco*, 310 U.S. 16, 30 (1940). When a statute's language and purposes foreclose alternative relief, to balance the equities would substitute the judgment of the judicial branch for that of the legislative.

Determining whether a statute permits remedies other than injunctive relief involves a particularized inquiry into its language and purposes. This Court's decisions in *TVA v. Hill* and *Weinberger v. Romero-Barcelo* illustrate the nature of that inquiry. *TVA v. Hill* involved a request for an order enjoining the completion of a dam which threatened the critical habitat of an endangered species in violation of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* The statute contained a flat ban on the destruction of critical habitats of endangered species. Since an injunction was the only available remedy for ensuring that the ban was respected, this Court felt bound to issue an order enjoining completion of the project. It stated:

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.

437 U.S. at 194-95.

By contrast, this Court in *Weinberger v. Romero-Barcelo* rejected the claim that a court was required to enjoin the Secretary of Defense from operating a training facility in violation of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* Its decision rested on its conclusion that the statute permitted a number of remedies other than the issuance of an immediate prohibitory injunction. Of crucial importance to this determination was that the timing of compliance was not a critical factor: the Act recognized the impracticability of achieving immediate compliance; its provisions only required an immediate cessation when pollution presented a health hazard; and the usual remedy for a violation of its strictures was an order establishing a detailed compliance effort aimed at achieving future compliance. 456 U.S. at 316-20. This Court noted that "the [fact that the] scheme as a whole contemplates the exercise of discretion and balancing of equities [on the part of the executive agency charged with enforcing the statute], militates against the conclusion that Congress intended to deny courts their traditional equitable discretion in enforcing the statute." 456 U.S. at 316. Since the Act did not require immediate compliance, this Court found that it contemplated relief other than an immediate prohibitory injunction.

Because Section 810 flatly prohibits leasing from proceeding in violation of its mandates, the only potential remedies for its continuing violation are an order voiding

the sales or an order maintaining the *status quo* until compliance is achieved. Section 810 governs the use and disposition of government lands—a power which the Constitution provides is the exclusive concern of Congress.[35] Its legislative history reveals that it is a remedial statute enacted for the sole purpose of remedying Interior's failure to adequately protect the subsistence uses of Alaska Natives. *E.g.*, 126 Cong. Rec. 29,278 (November 12, 1980) (statement of Rep. Udall). That history also indicates that Section 810 implements these policies by restraining the exercise of executive discretion so that the subsistence uses and needs of Alaska Natives are "incorporated into existing land use planning processes." S. Rep. No. 413, 96th Cong., 2d Sess. 234, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, 5178.

To ensure that subsistence uses are in fact "incorporated into . . . planning processes," Congress conditioned Interior's power to lease public lands. The statute prohibits dispositions of the public lands in Alaska unless the concerned agency studies subsistence uses, evaluates how those uses will be affected by proposed dispositions, holds certain hearings, and makes three specified findings. As a substantive matter, it prohibits any unnecessary development which would unreasonably interfere with subsistence uses.[36] The timing of compliance is crucial. Expressing a congressional determination that compliance must precede leasing, the plain language of Section 810(a) directs the Secretary to comply with the first sentence "[i]n determining whether . . . to lease" and mandates that "no such . . . lease . . . shall be effected" until he complies with

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[35] U.S. Const. art. IV, § 3; *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537-38 (1840).

[36] The substantive protections of Section 810 are supplied by the findings. They are substantive to the extent they require the existence of certain conditions and are subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 706.

the second. 16 U.S.C. § 3120(a). Confirming this plain language, the legislative history of Title VIII reveals that Congress intended that "until the requirements of . . . section [810] have been satisfied the proposed action *may not* proceed." S. Rep. No. 413, 96th Cong., 2d Sess. 234, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, 5178 (emphasis added).

This congressional ordering of the disposition of public lands in Alaska can only be effectuated by an order voiding the action taken or an order maintaining the *status quo* until compliance is achieved. Congress has decided that leasing is a critical stage in the planning process and that compliance must precede leasing. Only two remedies can effectuate and implement this congressional directive. If the Secretary can approach a post-sale compliance effort with an open mind, and the tribal villages submit that he cannot, the proper remedy is an order maintaining the *status quo* until he complies. If he cannot, the proper remedy is an order voiding the sales. The plain language and purpose of the statute simply countenance no other alternative.

V. THE COURT OF APPEALS CORRECTLY FOUND THAT THIS CASE DID NOT INVOLVE A RETROACTIVE APPLICATION OF THE CONSERVATION ACT.

The Secretary as well as the oil companies also claim that the Conservation Act should not be applied to the Norton Sound and Navarin Basin lease sales even if the Act generally applies to OCS leasing. They rely on *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) to rebut the "presumption in favor of retroactive" application which, in this Court's words, "can seldom be overcome." *Los Angeles v. Manhart*, 435 U.S. 702, 719, 729 (1978). The decision in *Chevron Oil* sets out the criteria which must be met to rebut the presumption favoring retroactive application. The test requires that a party show: (1) a justifiable reliance

on a well-established interpretation or rule of law; (2) an overall benefit flowing from prospective application; and (3) a balance of equitable considerations tipping in favor of a prospective application. 404 U.S. at 106-107. Designed to ensure that behavior based on reasonable expectations is not unconscionably penalized, the rule identifies those situations when the development of new legal principles should not be applied to past action.

Chevron Oil Co. is irrelevant to the Secretary's and the oil companies' claim that the Conservation Act should not apply to OCS lease sales 57 and 83. The record in this case demonstrates that the Conservation Act has not been applied retroactively. Retroactive application by definition involves the application of new law to past actions. In this case, the legal challenges were made *before* the parties acted. Since the legal challenges preceded the actions complained of, the factual predicate for claiming that the Conservation Act is being applied retroactively does not exist. *See Unger v. Consolidated Foods Corp.*, 693 F.2d 703, 709 (7th Cir. 1982), *cert. denied*, 464 U.S. 1017 (1983).

The operative and uncontroverted facts are set out by the lower court's opinion. Congress passed the Conservation Act in December of 1980. *Gambell I* was filed on March 4, 1983, about two weeks before Interior held the Norton Sound sale. It was submitted to the court of appeals following oral argument on October 7, 1983. While the case was submitted, the Secretary determined to hold another lease sale. He did so "with knowledge that his right to do so without complying with the Conservation Act was in doubt." *Gambell II*, 774 F.2d at 1427. The oil companies that were parties to *Gambell I* bid on the leases offered at this sale. They placed their bids "with full knowledge of the risks involved in expending money at a time when the validity of leases sold without compliance with the Conservation Act was pending." *Id.*

These facts do not support the claim that the lower court applied a novel interpretation of the Conservation Act to lease sales held before the Secretary and the oil companies had notice that their interpretation of the Conservation Act would be challenged. This case involves only two lease sales. One was subjected to a Conservation Act challenge before it was held. The other was held after *Gambell I* was submitted—when both the Secretary and the oil companies had actual notice of the potential problems associated with holding an OCS lease sale in Alaska without complying with that Act. Since the two sales at issue were held after all parties had notice of the Conservation Act challenge, this case does not involve the issue of whether the Conservation Act should be applied retroactively. Rather than embodying a retroactive application of a new and unexpected statutory interpretation, the court of appeals' decision merely illustrates the established rule that a litigated case acts as a *lis pendens*, placing on notice all bidders at sales held subsequent to its filing. *E.g., Conservation Law Foundation v. Andrus*, 623 F.2d 712, 720 (1st Cir. 1979); *North Slope Borough v. Andrus*, 486 F. Supp. 326, 331 (D. D.C. 1979).

CONCLUSION

The court of appeals should be affirmed. Alternatively, the Court should grant the tribal villages' cross-petition and issue a writ of certiorari directing the lower court to consider the aboriginal title claims of Alaska Natives to those portions of the OCS which they have traditionally used and occupied.

Respectfully submitted,

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APPENDIX A

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

1. Section 102 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3102, provides in relevant part:

As used in this Act (except that in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act, and the Alaska Statehood Act)—

(1) The term "land" means lands, waters, and interests therein.

(2) The term "Federal land" means lands the title to which is in the United States after the date of enactment of this Act.

(3) The term "public lands" means land situated in Alaska which, after the date of enactment of this Act, are Federal lands, except—

(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act.

Section 801 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3111, provides:

The Congress finds and declares that—

(1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;

(2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;

(3) continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management;

(4) in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents; and

(5) the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require that an administrative structure be established for the purpose of enabling rural residents who have personal

knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.

Section 810 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3120, provides in relevant part:

(a) In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—

(1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 805;

(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

(b) If the Secretary is required to prepare an environmental impact statement pursuant to section 102(2)(C) of the National Environmental Policy Act, he shall provide

the notice and hearing and include the findings required by subsection (a) as part of such environmental impact statement.

ALASKA NATIVE CLAIMS SETTLEMENT ACT

Section 4 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1603, provides in relevant part:

(a) All prior conveyance of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

(b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

(c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

APPENDIX B

BRIEF OF APPELLEES JAMES G. WATT, *et al.* IN *GAMBELL I*, pp. 47-49

III

EVEN IF THE VILLAGES PREVAIL BEFORE THIS COURT, THE LEASES SHOULD NOT BE VOIDED

The villages assert (Br. 40-41) that they are entitled to have the leases set aside if they prevail on either of their theories. While the Court's power to set aside leases is unquestioned, doing so here would be inappropriate even if the villages' appeal has merit.

* * * *

With respect to the ANILCA claims, we have shown that, even if that statute applies, the Secretary has already taken the steps is requires, though under the authority of other states (see *supra* at 43-47). It is therefore unnecessary to void the agency action in question. See *Denton v. Secretary of the Air Force*, 483 F.2d 21, 28 (9th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974). Should the Court find it appropriate to order the Secretary to carry out the procedures of Section 810, there is no need to undo what has already been done. The proper role for the court is to simply maintain the status quo while the Secretary does whatever is necessary to comply. See *California v. Watt*, 683 F.2d 1253, 1266 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3818 (May 16, 1983).

Thus, the highly disruptive remedy of voiding the leases should not be afforded even if the villages prevail.

APPENDIX C

BRIEF OF APPELLEES ARCO ALASKA, INC., *et al.* IN *GAMBELL I*, pp. 47-50

III. The Remedy Demanded By Plaintiffs Is Inappropriate.

Plaintiffs assert that, if this Court finds either of their theories meritorious, then the Court must at once void the leases. Plaintiffs will not be satisfied if the Court, assuming irreparable harm can be shown, enjoins exploration and development activity pending resolution of plaintiffs' aboriginal title claim at trial or pending the Secretary's explicit compliance with § 810 of ANILCA. Plaintiffs' goal is to obtain the relief that will have maximum disruptive effect on the lease sale.

A similar issue was presented to this Court, and decided adversely to plaintiffs, in *California v. Watt*, 683 F.2d 1253, 1266 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3818 (U.S. May 16, 1983). That case involved the question whether the Secretary was required, before selling leases, to make a determination that the lease sales were consistent with the adjacent state's coastal management plan. The Court held that he was so required. This Court affirmed the district court's order insofar as it enjoined development activities until such time as the Secretary made the required consistency determination. The district court had also voided the bids for the tracts at issue and ordered the deposits returned to the bidders. This Court vacated that portion of the district court's order, agreeing with the defendants that

> "cancellation of bids after their contents have been revealed is excessive, punitive, unprecedented, and destroys the essence of secret bidding procedures, thus causing the loss of millions of dollars the bidders spent compiling the data for the bids. . . . [S]uch drastic measures should

> be deferred at least until it is finally decided whether Lease Sale 53 can go forward in its present form."

683 F.2d at 1266. For the same reasons, if plaintiffs should prevail on this appeal, this Court should not void the leases, but should do no more than, at most, enjoining environmentally sensitive operations pending the conclusion of subsequent proceedings.

* * * *

B. The ANILCA Claim

Plaintiffs' ANILCA claim is, for purposes of determining the appropriate provisional remedy, equivalent to the Coastal Zone Management Act claim in *California v. Watt:* plaintiffs argue that the Secretary did not undertake certain procedures required by statute to be completed before the lease sale went forward. If this Court should hold that § 810 of ANILCA applies to the OCS, the appropriate remedy would be the same as that ordered in *California v. Watt:* to enjoin further activities until the Secretary completes the procedures required by the statute, if irreparable harm is shown, see *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). Plaintiffs' assertion that the Secretary will perform the procedures in bad faith, Appellants' Brief at 42, has no merit. The Court must assume that an administrative agency will comply with the law. *See SEC v. Chenery Corp.*, 332 U.S. 194, 199-200 (1947) (on remand, SEC is free to arrive at the same decision if it applies the proper criteria).

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Nos. 85-1239 and 85-1406

In the Supreme Court of the United States

OCTOBER TERM, 1986

AMOCO PRODUCTION COMPANY, ET AL., PETITIONERS

v.

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

In their submissions, respondents and amici repeat the arguments that Congress intended Section 810 of ANILCA, 16 U.S.C. 3120 to apply throughout the OCS *and* that Congress specifically required the judicial issuance of broad injunctive relief in virtually all cases in which Section 810 is violated, thereby relieving a person seeking to enjoin an ongoing federal program from making the traditional showing required to obtain such extraordinary relief. As we explained in our opening brief and further show in this submission, neither proposition is tenable. Respondents also reiterate their claim that the Secretary violated Section 810

by failing to implement procedural requirements at the lease sale stage that, in their view, were triggered because of a mere possibility of significant subsistence restrictions at the development and production stage. Under respondents' view, however, all Section 810 review of the OCS planning process would have to occur at the initial lease sale stage, in contravention of the rationale of this Court's decision in *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984). Finally, respondents replace the court of appeals' misapplication of the rules governing retroactive application with their own erroneous argument that retroactivity is not at issue in this case at all. We respond to each of respondents' contentions below.

1. In our opening brief (Br. 17-27), we explained that the court of appeals reversed the district court's denial of preliminary injunctive relief on the erroneous ground that a court has a "duty" to enter an injunction when it finds a violation, or likely violation, of a procedural environmental statute, except in "unusual circumstances" (see Pet. App. 15a). We established, moreover, that the district court properly applied traditional principles of equity in denying respondents' request for injunctive relief (see Br. 18, 27). Respondents' response is two-fold: first, in an understandable effort to distance themselves from the court of appeals' rationale, respondents primarily contend (Br. 42-44) that traditional equitable principles support a grant of preliminary injunctive relief; and, second, respondents alternatively attempt to support the court of appeals' ruling by contending (*id.* at 44-48) that Section 810 of ANILCA evinces congressional intent to compel the issuance of injunctive relief in this case. Both contentions are unavailing (even on the assumption, which we also contest, that Section 810 applies to this case).

a. First, respondents' argument that the court of appeals could have granted preliminary injunctive relief on the basis of traditional equitable principles is misdirected because it misapprehends the procedural posture of the case. The district court applied traditional equitable

principles and, on that basis, properly *denied* respondents' request for preliminary injunctive relief. The district court concluded that "[t]he balance of irreparable harm does *not* favor the [respondent]" and that "[t]he public interest favors continued oil exploration" (Pet. App. 43a (emphasis in original)). Hence, the only issue before the court of appeals was whether the district court's decision amounted to an abuse of discretion. See *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931-932 (1975). Neither the court of appeals nor respondents, however, have shown that such an abuse of discretion occurred.

The court of appeals did not question the district court's findings that "delay in the exploration of the OCS may cause irreparable harm to this nation's quest for new oil resources and energy independence" and that "exploration will not significantly restrict subsistence resources" (Pet. App. 43a). Instead, the court of appeals faulted the district court because, having found that there was a strong likelihood that the Secretary had violated Section 810, the district court had a "duty to issue an injunction" (Pet. App. 15a). According to the court of appeals (*id.* at 15a, 19a-21a), Congress intended federal courts to presume that respondents would be "irreparabl[y] harm[ed]," absent injunctive relief, and that the "public interest" automatically favored issuance of such relief. Thus, the sole basis upon which the court of appeals' reversal of the district court's denial of preliminary injunctive relief could be upheld is that Section 810 evinces specific congressional intent to limit the traditional equitable discretion of federal courts to deny the issuance of preliminary injunctive relief even where, as in this case, the movants have failed to establish either that irreparable harm would otherwise result or that the public interest favors such an extraordinary remedy.[1]

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[1] The court of appeals did reject the district court's conclusion that the "public interest" favored rejection of respondents' request for injunctive relief (see Pet. App. 23a n.2 ("Congress has chosen the protection of subsistence life over oil exploration")), but as dis-

Respondents nonetheless invite (Br. 42-44) this Court to reconsider the district court's findings that exploration poses no danger of irreparable harm to subsistence uses and that an injunction would cause the federal government irreparable harm. Relitigation in this Court of factual matters previously decided by the trial court, and not found to be clearly erroneous by the court of appeals, however, is inappropriate. In any event, the district court's findings are fully supported by the record in this case, particularly by the similar findings contained in the Department's Section 810 evaluation (see Pet. App. 103a, 106a). Respondents, moreover, cannot rely on predictions of events that might occur, if at all, only at a later stage (development and production) to dispute findings concerned solely with the exploration stage (see Resp. Br. 43 nn.33 & 34).[2] Finally, respondents' contention (Br. 42) that the federal government failed to establish that an injunction would harm any "governmental proprietary interest" is beside the point. Where, as in this case, the government has established that injunctive relief would irreparably harm "this nation's quest for new oil resources and energy independence" (Pet. App. 43a)—an interest of explicit congressional concern (see 43 U.S.C. 1332 (3))—the government need not also show any injury in its proprietary capacity.[3]

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cussed in our opening brief (Br. 25-26 & n.16), that ruling was erroneous as a matter of law.

[2] Respondents cannot rely on any asserted inadequacy in the environmental analysis regarding leasing to supply a basis for enjoining exploration, because the latter is a distinct planning phase. Cf. *Kleppe* v. *Sierra Club*, 427 U.S. 390, 407 n.16 (1976). Respondents notably never challenged, pursuant to 43 U.S.C. 1349(c), the Secretary's approval of the exploration plans in the two lease sale areas (see Fed. Pet. Br. 6, 9).

[3] Respondents (Br. 42) incorrectly state that the government "[t]acitly conced[ed] that [it] would suffer no harm if the courts authorized injunctive relief." In fact, the Secretary identified two types of irreparable harm that an injunction would cause: (1) irreparable harm to efforts under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. (& Supp. II) 1331 *et seq.*, to assess expedi-

b. Respondents alternatively argue (Br. 44-48) that the court of appeals' decision is correct because Congress intended to limit the traditional equitable jurisdiction of federal courts to fashion remedies to redress violations of Section 810 of ANILCA. To support this view, respondents and their supporting amici point out that Section 810's procedural requirements are mandatory and must be complied with prior to the particular disposition of public lands to which they relate. See, *e.g.*, Resp. Br. 46-48; Amici California, et al., Br. 14-17; Amici NRDC, et al., Br. 16-17. As explained in our opening brief (Br. 22-27), however, neither the obligatory nature of Section 810's procedural requirements nor the timing of their application sufficiently evinces congressional intent to circumscribe the traditional authority of a federal court to fashion a remedy that is responsive to the equities of a particular case.

Most fundamentally, respondents and their supporting amici have confused the threshold question of whether a mandatory statutory requirement has been violated with the distinct and separate inquiry of whether Congress has intended to require courts to enforce certain remedies once such a violation has been established in a particular case. We do not dispute that Section 810's procedural requirements are mandatory. Nor do we contest that Congress intended that Section 810's procedural requirements would be met prior to the particular decision of the Secretary to which they relate. As discussed in our opening brief (Br. 19-21), we posit only that under this Court's decision in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), neither factor suffices to show that Congress intended to curb the traditional authority of the federal courts, once a violation of Section 810 has been estab-

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tiously the extent of oil and gas resources offshore Alaska; and (2) irreparable harm to efforts to gather geological information necessary for planning the next lease sale in Norton Sound. See Fed. Defs. Opp. to Plaintiffs' Mot. for Preliminary Injunction 25-28; Fed. Appellee's Br. 44-47 (*Gambell II*).

lished, to fashion remedies that are responsive to the facts of the particular case at hand.[4]

Respondents and amici argue that this case, unlike *Romero-Barcelo* and like *TVA* v. *Hill*, 437 U.S. 153 (1978), involves an "absolute" duty and, therefore, as in the latter case, Congress must be deemed to have "specifically required" issuance of sweeping injunctive relief and to have barred district court consideration of the application of traditional equitable principles to the facts of the case.[5] Respondents' analysis is flawed, however, because the controlling question is not whether a statutory duty is "mandatory" or "absolute"; the statutory prohibition at issue in *Romero-Barcelo*—Section 301 of the Clean Water Act, 33 U.S.C. 1311(a) (see 33 U.S.C. 1323(a))—was as uncompromising in nature as Section 810 and did not prevent this Court from concluding in that case that injunctive relief was not automatically required. See 456 U.S. at 313 ("a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law").

Instead, as we explained in our opening brief (Br. 21-22), the controlling issue in this case is whether a non-injunctive remedy (or even a narrowly-drawn injunctive remedy) may be fashioned that "neither ignore[s] the statutory violation nor undercut[s] the purpose and function of the [relevant statutory provision]" (*Romero-Bar-*

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[4] Cf. *Brock* v. *Pierce County*, No. 85-385 (May 19, 1986), slip op. 6 ("We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended for the agency to lose its power to act.").

[5] Respondents apparently abandon the two other grounds on which the court of appeals purported to distinguish *Romero-Barcelo* (see Pet. App. 22a-23a & n.2): (1) "in enacting Section 810, Congress has chosen the protection of subsistence life over oil exploration" and (2) *Romero-Barcelo* involved a permanent rather than a preliminary injunction. See Fed. Pet. Br. 25 n.14, 25-26 & n.16.

celo, 456 U.S. at 315). On this basis, in *TVA* v. *Hill*, this Court inferred congressional intent to withdraw the district court's equitable discretion because the very objects of the relevant statute's substantive provisions, which, unlike this case, flatly banned certain adverse impacts (see 456 U.S. at 314), would have been irretrievably jeopardized. By contrast, here, as we have shown (see Fed. Pet. Br. 23-27), and as the district court found (Pet. App. 43a), continued exploration while the Secretary reexamines potential impacts on subsistence uses "will not cause the type of harm, a restriction in subsistence uses or resources, that ANILCA was designed to prevent" (*ibid.*).

In addition, there is no reason to assume that the procedural objectives of Section 810 will be subverted, as respondents and amici claim, by allowing continuing exploration. As described in our opening brief (Br. 4-5, 7-8, 9), the Department of the Interior had already given substantial consideration to subsistence impacts prior to holding the two lease sales and, at the time of the district court's ruling, had reevaluated subsistence under the specific dictates of ANILCA. The Secretary's willingness to comply with *Gambell I*, coupled with his continuing "power to control and shape the off-shore leasing process" (Pet. App. 43a), flatly contradicts amici's unsubstantiated concern that continued exploration will "[destroy] the integrity of the decision-making process" (Amici California, et al., Br. 19).[6]

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[6] Contrary to Amici NRDC's argument (Br. 18 & n.10) that the Secretary's continuing authority to remedy adverse subsistence impacts is sharply limited, subsistence impacts plainly qualify under 43 U.S.C. 1334(a)(2)(A)(i) as a type of "serious harm or damage to life (including fish and other aquatic life) * * * or to the marine, coastal, or human environment" that may justify lease cancellation. In addition, NRDC ignores that the Secretary possesses the authority to take steps short of lease cancellation, such as disapproval of production and development plans, to respond to subsistence concerns. See 43 U.S.C. 1351(h)(1); see also *Village of False Pass* v. *Clark*, 733 F.2d 605, 614-615 (9th Cir. 1984).

Finally, the contentions of respondents and amici prove too much. Under their view, the only appropriate remedy in this case would be to void the lease sale itself because any "post hoc" compliance would subvert the purposes of Section 810. See, *e.g.*, Amici NRDC, et al., Br. 11 ("Pre-decision consideration is the raison d'etre of section 810(a), and allowing post hoc compliance * * * is unquestionably contrary to the purposes of Section 810."); Amici California, et al., Br. 16.[7] Under that view, even the Ninth Circuit's standard for the issuance of injunctive relief—which allows for denial of injunctive relief that would cause environmental harm or disrupt long-term contracts (see Pet. App. 16a-17a)—would be impermissible.[8] Presumably for this reason, respondents ultimately acknowledge that Congress did not intend to require that a court void the lease sale in all instances and specifically admit that "[i]f the Secretary can approach a post-sale compliance effort with an open mind, and the tribal villages submit that he cannot, the proper remedy is an order maintaining the status quo until he complies" (Resp. Br. 48). Having accepted the principle that a remedy of post-sale compliance (without voiding the lease sale) is not necessarily inconsistent with Section 810's purposes, respondents, however, fail to explain why continued exploration may not similarly be acceptable in

[7] The argument of Amici NRDC, et al. (Br. 12-14) and Amici California, et al. (Br. 17-18) that courts must grant injunctive relief for violations of mandatory procedural requirements in order to avoid breaching separation of powers principles is hopelessly overbroad. In any event, essentially the same argument was squarely rejected by this Court in *Romero-Barcelo*.

[8] Notably, the court of appeals never explains the basis for its creation of these two exceptions to its otherwise sweeping per se injunction rule. These exceptions, however, confirm our view that the mandatory nature of Section 810's procedural requirements is relevant to the threshold question of whether Section 810 has been violated but does not answer the question of what is an appropriate remedy to address a violation in a particular case.

some cases.[9] Respondents, therefore, are left only with their wholly unsubstantiated accusation that the Secretary cannot, in their view, keep an "open mind" in this particular case (*ibid.*). The record provides no support for this allegation of bad faith directed against the Secretary.[10]

2. In our opening brief (Br. 27-36), we demonstrated that respondents' claim that Section 810 of ANILCA applies to the OCS is contradicted by the language of ANILCA, its statutory purposes, and its legislative history. We further showed (Br. 36-43) that respondents' claim that any ambiguity in the geographic scope of Section 810's application should be resolved in favor of the interests of Native Alaskans was misdirected both because no ambiguity exists in the first instance and because, in any event, the canon of statutory construction favoring the resolution of ambiguities in favor of Indians has little bearing on a legal issue that is not peculiar to the interests of Native Alaskans. Respondents, for the most part, do not address the affirmative points made in our brief. Perhaps most notably, neither respondents nor the State of Alaska, as amicus curiae, seriously disputes

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[9] See, *e.g.*, *Alaska* v. *Andrus*, 580 F.2d 465, 485-486 (D.C. Cir.) (injunction barring OCS exploration inappropriate, notwithstanding NEPA violations, because Secretary's opportunity to choose among alternatives not dependent upon cessation of exploration), vacated in part on other grounds, 439 U.S. 922 (1978).

[10] Respondents also wrongly claim (Br. 40-41) that the Secretary invited a preliminary injunction against exploration in *Gambell I*. *Gambell I* concerned only Lease Sale 57 and did not include a challenge to exploratory drilling. Hence, when the Secretary contended in *Gambell I* that, even if a violation of Section 810 had occurred, "there is no need to undo what has already been done[;] [t]he proper role for the court is to simply maintain the status quo while the Secretary does whatever is necessary to comply" (Pet. App. 3a), the Secretary was not "requesting" an injunction, but was merely arguing against rescission of the sale. No doubt for this reason, the court of appeals in *Gambell II* refers to the Secretary's brief in *Gambell I* only in its recitation of the facts (see *ibid.*) and in no manner bases its decision on the ground suggested now by respondents.

our contention that the term "public lands" has traditionally applied only to onshore holdings of the federal government.[11] In this reply, therefore, we need address only a few discrete arguments set forth in respondents' brief.[12]

a. Respondents and amicus Alaska attempt to avoid the force of our argument that areas of the OCS are not "public lands" within the meaning of ANILCA—because they are not "lands the title to which is in the United States" (16 U.S.C. 3102(2))[13]—by contending (Resp. Br. 22-24; Amicus Alaska Br. 12-13) that "lands" includes "interests therein" (16 U.S.C. 3102(1)) and that the United States does claim title to the oil and gas resources within the OCS. Accordingly, respondents argue, leasing of the mineral resources constitutes a disposition of "public lands." Respondents' statutory patchwork, however, is flawed in several fundamental respects.

First, "public lands" is defined as land "situated in Alaska" (16 U.S.C. 3102(3)), and, like the OCS itself,

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[11] Nor could they because, as explained in our opening brief (Br. 29-30), the limited nature of sovereign interests in the OCS is an important aspect of international law. See *The United Nations Convention on the Law of the Sea*, art. 77 (1982); 19 Weekly Comp. of Pres. Doc. 383-385 (Mar. 10, 1983). Indeed, a contrary view would be potentially inconsistent with the settled rights of all nations to undertake such essential activities as the laying of submarine cables and pipelines on the OCS. See *Law of the Sea*, art. 79; 19 Weekly Comp. of Pres. Doc., *supra*, at 384-385.

[12] We do not address respondents' initial lengthy argument (Br. 12-21) that they possess aboriginal title to portions of the OCS because that issue is the subject of their cross-petition in No. 85-1608; this Court has not yet acted on that cross-petition and, therefore, the issue is not before the Court in this case. See Sup. Ct. R. 34.1(a). In addition, as explained at length in our opposition to that cross-petition (at 5-9), the aboriginal title issue has no bearing on the geographic scope of Section 810, which is at issue in this case.

[13] Contrary to respondents' contention (Br. 23 n.24), we are not raising a separate issue concerning "title." The question of "title" is simply part of the analysis of the broader question whether "public lands," as used in ANILCA, includes the OCS, which is an issue that was both briefed in and decided by the courts below.

the mineral resources within the OCS are, by definition, outside Alaska's three-mile seaward boundary (even as far as 350 miles). See Fed. Pet. Br. 29. Shifting the focus away from the seabed and to the mineral resources does not remove this threshold obstacle to respondents' claim. Second, respondents' contention that the United States claims title to the mineral resources of the OCS rests on a false premise because, while Congress asserts its sovereign right to control the development of those resources (including the receipt of royalty payments), Congress has carefully avoided claiming formal title to the mineral resources of the OCS. See, *e.g.*, 43 U.S.C. 1302.[14]

b. Respondents' argument (Br. 24) that "Congress routinely asserts that the United States holds title to the OCS for purposes of domestic legislation" is similarly unpersuasive. To be sure, Congress has on a few isolated occasions expressly excluded the OCS from the definition of "public lands," out of an apparent abundance of caution, but that hardly demonstrates that Congress has abandoned the distinction it has historically drawn between "title" to and "jurisdiction and control" over the OCS.[15] Indeed, as described in our opening brief (Br.

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[14] A formal claim of title to oil and gas in the ground (not yet reduced to possession) need not be a prerequisite to a right to develop those resources. See *Ohio Oil Co.* v. *Indiana*, 177 U.S. 190, 208-209 (1900); 1 H. Williams & C. Meyers, *Oil and Gas Law* §§ 203.I-203.3 (1985).

[15] Neither respondents nor Alaska attempts to rebut our explanation (Fed. Pet. Br. 32 n.20) of why the parenthetical exclusion of the OCS from the coverage of Section 1001(a) of ANILCA does not reveal a congressional assumption that the phrase "Federal lands * * * in Alaska" would otherwise include it. The explicit exclusions in the two other statutes discussed by respondents (Br. 24), the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. 1702(e), and the Archeological Resource Protection Act (ARPA), 16 U.S.C. 470bb(3), can similarly be explained. A primary impetus for FLPMA was the absence prior to that time of an "'Organic Act'" for the Bureau of Land Management. See H.R. Rep. 94-1163, 94th Cong., 2d Sess. 41 (1976) (letter from Assistant Secretary of the Interior Horton). Presumably because BLM at that time also administered leasing under the OCSLA, Congress

31), whenever the title issue has been raised, Congress has carefully and consistently stressed that "[t]he U.S. does not hold title to the OCS * * *." See, *e.g.*, H.R. Rep. 99-300, 99th Cong., 1st Sess. 591 (1985). It is not surprising, therefore, that respondents have not cited a single instance in which Congress has included the OCS within the meaning of "public lands" in a federal statute.

c. Respondents' reliance (Br. 26-33) on ANCSA to support their contention that the OCS is "in Alaska" for the purposes of Section 102(3) of ANILCA, is misplaced. As explained at length in our opening brief (Br. 37-39), although both ANILCA and ANCSA employ the phrase "in Alaska" and the two statutes share certain common roots, their statutory contexts are wholly different and indicate different geographic scopes. In particular, in Section 4(b) of ANCSA, 43 U.S.C. 1603(b), the phrase is used in the context of language which extinguished "all" aboriginal title claims, whether on private, state or federal lands, or "submerged land underneath all water areas, both inland and offshore," while in Section 102 of ANILCA, there is no reference to offshore lands, and no broad legislative purpose to encompass all types of claims, wherever located. Compare S. Conf. Rep. 92-581, 92d Cong., 1st Sess. 40 (1971).[16] Indeed, as we pointed out

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expressly excluded the OCS to dispel any possible suggestion that this new "Organic Act" affected OCS leasing. Similarly, Congress likely explicitly excluded the OCS from the geographic scope of the ARPA to ensure preclusion of any federal ownership claims to shipwrecks located on the OCS. Comparable claims had previously been made, and rejected, under the Antiquities Act. See, *e.g.*, *Treasure Salvors, Inc.* v. *Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 337-340 (5th Cir. 1978).

[16] Respondents incorrectly suggest (Br. 32-33) that the United States took inconsistent positions on this point in *Gambell I* and in *Inupiat Community* v. *United States*, 746 F.2d 570 (9th Cir. 1984), cert. denied, No. 84-1801 (Oct. 7, 1985). In *Inupiat*, the United States did not broadly contend that the phrase "in Alaska," by itself, mandated application to the OCS. Instead, we relied, inter alia, on the language of Section 4(b) of ANCSA, which expressly extinguishes claims to "submerged land underneath all wa-

in our opening brief (Br. 36, 40-41), the legislators who passed ANILCA repeatedly stressed their intention not to affect development of the OCS.[17]

d. Respondents also mistakenly contend (Br. 28) that the testimony of the Alaska Federation of Natives (AFN) supports their view of the geographic scope of Section 810. As we explain in our opening brief (Br. 42-43 & n.28), however, the AFN proposal actually confirms our view that all parties assumed that the OCS was outside the scope of ANILCA. Indeed, the very excerpt from the AFN testimony upon which respondents rely (Br. 28) reveals that the AFN urged application of Title VIII of ANILCA only to "subsistence uses on all Federal public lands."[18] In any event, the missing link in respondents'

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ter areas, both inland and offshore," and on Section 4(c)'s extinguishment of all claims "based on" claims to land and water areas "in Alaska," which would necessarily include aboriginal claims to the OCS. See Fed. Defs. Reply Mem. in Support of Mot. for Judgment on the Pleadings at 22-23; see also U.S. Br. 34 & n.22, *Inupiat Community* v. *United States*, 746 F.2d 570 (9th Cir. 1984), cert. denied, No. 84-1801 (Oct. 7, 1985).

[17] Respondents erroneously contend (Br. 31-32) that those statements regarding the limited scope of ANILCA applied only to nonsubsistence provisions of that Act. In fact, Representative Young of Alaska, when specifically asked about the scope of the subsistence provisions of ANILCA during a 1978 hearing, stated that they encompassed "all Federal lands—and that is two-thirds of the State" (see *Alaska Lands—Part 2: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 2d Sess. 449 (1978)). Of course, the reference to "two-thirds of the State" rebuts any suggestion that the congressman intended to include the OCS, which is more than twice the size of the State (see Fed. Pet. Br. 36).

[18] The map to which respondents refer (Br. 29 n.28 citing Pltfs. Exh. I (attached to Pltfs. Mot. for Summary Judgment, *Gambell* v. *Watt*, No. N83-3 (D. Alaska))) in no manner suggests that the natives were entitled to areas of the OCS. As explained in an affidavit submitted by a Department of the Interior official and filed with the trial court in *Gambell I* (see Fed. Defs. Exh. E, at 4 (attached to Fed. Defs. Resp. to Pltfs. Mot. for Summary Judgment)), the boundary lines on the map were protracted across off-

argument, apart from any convincing showing that the AFN believed that Title VIII extended to the OCS, is any showing that *Congress* intended that result. Whatever the subjective intent of the AFN, it is the intent of Congress, and not of the AFN, which is at issue here, particularly because, as respondents readily acknowledge, Congress did not adopt the AFN proposal (see Resp. Br. 29 n.28).[19]

e. Respondents contend (Br. 31) that Congress's inclusion of the Fishery Conservation and Management Act, 16 U.S.C. (& Supp. II) 1801-1802, in the ANILCA savings clause (see 16 U.S.C. 3125(4)) demonstrates legislative intent to extend the geographic scope of Title VIII to the OCS because ANILCA could not affect fishery management unless it applied beyond the territorial sea. The premise of this argument is flawed from the outset, however, because, as even respondents concede (Br. 31), the Fishery Conservation and Management Act applies onshore in some instances (see, *e.g.*, 16 U.S.C. 1801(a)(1) and (b)(1), 1856(b)(1)). Hence, the mere addition of that Act along with several others to a laundry list of statutes that were not to be deemed modified or repealed by Title VIII sheds no light on whether Congress contemplated that Title VIII would apply to the OCS.[20] Of greater sig-

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shore waters simply to indicate native entitlement to various islands and rocks and not to suggest any entitlement to the OCS itself.

[19] In extending the scope of Title VIII beyond conservation units to include all public lands, Congress was simply rendering the geographic scope of ANILCA equivalent to the scope of the withdrawal provisions of Section 17(d)(1) of ANCSA, 43 U.S.C. 1616(d)(1), which, unlike the extinguishment provision of Section 4(b) of ANCSA, plainly apply only to onshore lands (see Fed. Pet. Br. 33). There is no suggestion in the legislative history that Congress intended that ANILCA, including Title VIII, would be broader in scope than Section 17(d)(1) of ANCSA.

[20] Congress added several statutes to the savings clause when it added the Fishery Conservation and Management Act. Compare H.R. 39, 95th Cong., 2d Sess. § 716(4) (Oct. 15, 1978) with H.R. 39, 95th Cong., 2d Sess. § 713 (May 23, 1978); see also Staff of House Comm. on Interior and Insular Affairs, 95th Cong., 1st Sess., Show-

nificance, however, is that Congress extended subsistence protection to "public lands" in Alaska at the same time that Congress was considering the OCSLA Amendments of 1978. Had Congress intended that "public lands" were to include the OCS, as respondents claim, there surely would have been some discussion of the relationship between the two statutory schemes; yet there is none.[21]

f. Finally, Alaska's contention (Br. 17-19) that our view of ANILCA's geographic scope would subvert the congressional purpose of protecting subsistence uses misapprehends ANILCA's statutory focus. In ANILCA, Congress plainly did not intend to protect all subsistence uses and resources in Alaska. Instead, Congress sought only to protect those uses and resources occurring on "public lands," and, thus, specifically declined to extend similar protection to State, private, or native lands, including those State lands located within the three mile band of submerged offshore land belonging to Alaska. See gen-

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ing The Substitute [H.R. 39] Adopted By The Subcomm. On General Oversight And Alaska Lands 95 (Comm. Print 1978).

[21] Indeed, the scant legislative history concerning the relationship between the two statutes reveals that members of Congress intended to keep the two programs separate. For example, when a witness testified at an ANILCA hearing in favor of native organization involvement in OCS development, Representative Seiberling responded that "this subcommittee [on General Oversight and Alaska Lands] does not have jurisdiction over either coastal zone management or Outer Continental Shelf development," and suggested that "since we have reported out an OCS bill with respect to oil leasing [the OCSLA Amendments of 1978], perhaps we can review that in light of some of these comments." *Inclusion of Alaska Lands in National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems: Hearings Before the Subcomm. on General Oversight and Alaska Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong. 1st Sess. Pt. XIII, 18-19 (1977). Possible conflicts with federal ocean policy were also a primary factor behind congressional rejection of efforts to extend ANILCA refuge protections seaward. See S. Rep. 95-1300, 95th Cong., 2d Sess. 149-150 (1978); see also 124 Cong. Rec. 18025-18026 (1978) (ANILCA was "intended to be a land bill") (remarks of Sen. Stevens).

erally 16 U.S.C. 3111, 3112.[22] Whether Alaska has decided to enact legislation to protect subsistence resources in the three-mile belt of ocean under its control is, therefore, irrelevant to the distinct issue of what Congress intended in ANILCA. We note, moreover, that Alaska does not contend that it has enacted any state law provision equivalent to Section 810.

3. In our opening brief (Br. 43-47), we showed that the court of appeals erred in holding that the mere possibility of a subsistence restriction at the development and production stage requires the Secretary at the leasing stage to fulfill the notice, hearing, and findings requirements contained in the second sentence of subsection 810 (a). In response, respondents mischaracterize our position before this Court, including our view of the relationship of Section 810 to leasing of federal lands.

a. First, respondents wrongly claim (Br. 33) that we have conceded that the Department of the Interior violated the threshold evaluation requirement set forth in the first sentence of Section 810(a). In fact, neither the district court nor the court of appeals questioned the adequacy of Interior's compliance with the subsistence evaluation requirement in preparing the post-sale subsistence analysis for Sale 57 (see Pet. App. 12a-14a),[23] and we

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[22] As we have shown in our opening brief (Br. 35), moreover, inclusion of the OCS within "public lands" is not necessary to protect seagoing subsistence resources, since numerous other federal statutes serve that purpose.

[23] Nor, as respondents allege (Br. 35), did either court "ignore[]" the post-sale analysis for Sale 57, or question the propriety of the Secretary's performance of such an analysis under these circumstances. Contrary to respondents' characterization, that analysis did not amount to a post-hoc explanation prepared for litigation, but was intended to cure the error found by the court of appeals in *Gambell I*. It is commonplace for courts to allow agencies to cure errors in post-hoc proceedings, without voiding completed transactions or interrupting ongoing activities. See, *e.g.*, *Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803, 813 (9th Cir. 1980); *United Steelworkers* v. *Marshall*, 647 F.2d 1189, 1311 (D.C. Cir. 1980). Notably, none of the cases cited by respondents (Br. 35) involved a statutory scheme, such as the OCSLA, where compliance proceeds in stages

have certainly never conceded the point.[24]

b. Respondents (Br. 34, 36) and Alaska (Br. 26, 27, 29-30) also erroneously contend that under our view the Secretary would never need to comply with Section 810 (a) (1)-(3) procedures at the lease stage and, as a result, the word "lease" in Section 810 would be read out of the statute.

We do not contend that Section 810's notice, hearing, and findings requirements are never triggered at the lease sale stage, but only that those procedures are not triggered where, as in this case, there is only a remote possibility of significant subsistence restrictions occurring at a later stage. Where the Secretary could conclude at the lease sale stage that such a significant restriction would occur at a later stage, the additional procedural requirements of Section 810 would have to be met at the lease sale stage.

For this reason, notwithstanding respondents' and Alaska's claim to the contrary, our view of Section 810 would not read the word "lease" out of Section 810. Even more fundamentally, however, the significance of the word "lease" in Section 810 does not turn on whether that provision applies to the lease stage (assuming Section 810 applies to the OCS at all), but rather on what *type* of lease triggers those additional procedural requirements.

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and the results of a post-stage analysis at one stage can inform subsequent decisions made at a later, more critical stage.

[24] Respondents (Br. 34 n.29) confuse our argument, based on the explicit Sale 57 post-sale analysis under Section 810, that Section 810 had been satisfied, with our alternative argument that "substantial compliance" with Section 810 was achieved prior to Lease Sales 57 and 83 on the basis of the assessments included in the environmental impact statements prepared by Interior. The courts below rejected the substantial compliance argument on the ground that the Secretary did not have the mandate of Section 810 "clearly in mind" when he carried out his substantial pre-sale evaluations of subsistence (see Pet. App. 8a, 37a). While we disagree with the courts' elevation of form over substance, we elected not to raise this issue in our petition for a writ of certiorari. Our omission of that issue in our petition, however, certainly does not amount to a concession that the studies underlying the subsistence evaluation were inadequate.

As this Court has explicitly found, a lease under the OCSLA, unlike many *onshore* leases, "entails no right to proceed with full exploration, development, or production," but conveys "only a priority in submitting plans to conduct those activities" (see *Secretary of the Interior* v. *California*, 464 U.S. 312, 339 (1984)). Respondents nonetheless argue (Br. 39) that Section 810's additional procedures must be followed at the OCS lease sale stage because "leasing constitutes an irrevocable commitment of resources." As this Court made clear in *Secretary of the Interior* v. *California*, 464 U.S. at 336-337, however, the grant of a lease under the OCSLA does not include express or implied approval of exploration, development, or production. Respondents' position, therefore, conflicts with the congressional decision, recognized by this Court in *Secretary of the Interior*, to separate the stages of OCS development in order to forestall premature litigation regarding potential environmental effects that might occur, if at all, only at later stages (see *id.* at 341).

c. Finally, respondents' argument (Br. 37-38) that this Court should reject the Secretary's reasonable interpretation of the word "would" in Section 810 is unpersuasive. Respondents do not offer any meaningful support for their view that Congress intended "may" when it said "would." In any event, even if their proposed construction were plausible, the only issue before this Court is whether the Secretary's own construction was reasonable (see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). In this case, the Secretary's determination that "would significantly restrict" means "likely" to significantly restrict constitutes a reasonable interpretation of the statute.[25]

Indeed, the cases concerning the meaning of Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. 4332(2)(C), upon which respond-

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[25] We note that the Secretary's standard is certainly more favorable to respondents than other accepted meanings of "would" rejected by the Secretary. For example, contrary to Alaska's suggestion (Br. 30), the Secretary has not taken the position that "would" means a certainty of restrictions.

ents rely (Br. 37-38), not only fail to question the reasonableness of the Secretary's interpretation in this case, but they underscore the propriety of judicial deference to reasonable agency statutory construction. First, Section 102(2)(C) of NEPA does not even employ the word "would." It simply refers to "major Federal actions significantly affecting the * * * human environment." Judicial decisions concerning the meaning of Section 102(2)(C), therefore, do not support respondents' claim that "would" in Section 810 should be construed to mean "may." In addition, there are explicit indications in Section 102(2) that "may" is the relevant standard. See, *e.g.*, 42 U.S.C. 4332(2)(A) ("decisionmaking which *may* have an impact on man's environment") (emphasis added); 42 U.S.C. 4332(2)(D)(iv) ("any action or any alternative thereto which *may* have significant impacts") (emphasis added). No comparable indications exist in Section 810. Finally, the federal agency responsible for NEPA's implementation has construed Section 102 to turn on the "may" standard (see 40 C.F.R. 1508.3) and that agency construction is entitled to substantial judicial deference. Here, the Secretary has construed the word "would" in Section 810 to mean "likely to" and that plainly reasonable interpretation should similarly be entitled to judicial deference.

4. In our opening brief (Br. 47-49) we argued that the decision of the court of appeals in *Gambell I* (even if correct, which we contest) should not be applied retroactively to lease sales held before the court of appeals' decision. Respondents do not contest our argument (Fed. Pet. Br. 47-49) that retroactive application would, without furthering ANILCA's statutory purposes, disrupt OCS exploration and development as well as financial arrangements made in reliance on the Secretary's prior construction. Instead, respondents argue (Br. 49) that retroactivity is not involved in this case, because "the legal challenges were made *before* the parties acted" (emphasis in original). This claim lacks merit.

The legal challenge to Lease Sale 83 was filed more than a year after that sale and almost four months after

the first exploration plan was approved (see Fed. Pet. Br. 8-9). Consequently, the legal challenge was made *after* and not "before the parties acted." [26] In addition, it is no bar to our retroactivity claim that *Gambell I* involved the very challenge to Lease Sale 57 at issue in this case. In *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 718-723 (1978), this Court held that retroactive relief was improper in a case, such as this one, in which the principle of law upheld was first announced by the lower courts in that same case. We submit that similar considerations govern this case (see Fed. Pet. Br. 48-49).

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

RALPH W. TARR
Solicitor
Department of the Interior

DECEMBER 1986

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[26] As we explained in our opening brief (Br. 48-49), retroactive application of *Gambell I* to Lease Sale 83 would be particularly inequitable because at the time that lease sale was held, the district court in the Lease Sale 57 case had ruled that Section 810 did not apply.

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Nos. 85-1239, 85-1406

In The

Supreme Court of the United States

October Term, 1985

ARCO ALASKA, INC.;
AMOCO PRODUCTION COMPANY, et al.,
Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, et al.,
Respondents.

DONALD P. HODEL, Secretary of the Interior;
and UNITED STATES DEPARTMENT
OF THE INTERIOR,
Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC., AND ALASKA SUPPORT INDUSTRY ALLIANCE IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC., AND ALASKA SUPPORT INDUSTRY ALLIANCE IN SUPPORT OF PETITIONERS

INTERESTS OF AMICI

Resource Development Council for Alaska, Inc. (RDC), and Alaska Support Industry Alliance (ASIA) are organizations which represent a broad spectrum of the public vitally interested in the fair and accurate interpretation of the environmental and conservation statutes that guide

the exploration for and development of Alaska's vast offshore petroleum energy resources. RDC and ASIA represent individuals and organizations, both private and governmental, whose economic survival will be, and is now being, severely and negatively impacted by erroneous legal rules and statutory constructions emanating from the United States Court of Appeals for the Ninth Circuit's decision in this case.

The Ninth Circuit's announced rule of a per se requirement of injunctive relief upon a prima facie showing of violation of an environmental or conservation statute has operated to unreasonably restrict the opportunities of RDC and ASIA's members to pursue their livelihoods and count upon stable sources of income. The Ninth Circuit's construction of Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120, has the capacity for producing negative effects on the Alaska and national economies by requiring the Secretary of the Interior to attempt to evaluate effects of outer continental shelf (OCS) exploration and development or production at a time in the leasing process when such effects are uncertain and speculative at best. Finally, the Ninth Circuit's decision in this case has ignored legislative history and thereby subverted congressional intent regarding expeditious OCS inventorying and development. The Ninth Circuit has attempted to redefine the public and national interest in a manner unintended by Congress and clearly harmful to amici's interest in their members' ability to pursue their livelihood. Consent for the filing of this brief has been obtained from the parties and previously lodged with the Court.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 774 F.2d 1414 (9th Cir. 1985).

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in petitioners' opening brief.

SUMMARY OF ARGUMENT

1. The Ninth Circuit has used the case under review as a vehicle for announcing a per se rule of automatic injunctive relief upon a prima facie showing of violation of an environmental or conservation statute. This local rule is in direct conflict with the guidance furnished by this Court in *Weinberger v. Romero-Barcelo,* 456 U.S. 305 (1982), for determining the appropriate conditions for limiting the equitable discretion of federal courts.

2. In its decision in *Secretary of the Interior v. California,* 464 U.S. 312 (1984), this Court recognized that the phased or tiered structure of federal decision making under the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1331, *et seq.,* reflects a conscious choice by Congress to key environmental review of OCS development activities to those tiered stages of decision making. The decision by the Ninth Circuit in the case under review creates a single anomalous exception to this carefully crafted structure of federal review for the evaluation of subsistence use impacts mandated by Section 810(a) of the

Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3120(a). The Ninth Circuit's justifications for this exception are unavailing and, in fact, result in rendering portions of ANILCA superfluous.[1]

3. The Ninth Circuit announced in the case under review that Congress in enacting Section 810(a) of ANILCA intended to create a substantive preference for the preservation of subsistence uses over the meeting of national OCS inventorying and development requirements. This assertion is unsupported by the legislative history of the Act and constitutes a clear usurpation of Congress' unique role as the setter of national policy.

ARGUMENT

I

THE NINTH CIRCUIT'S PER SE RULE FOR THE GRANTING OF INJUNCTIVE RELIEF DIRECTLY CONTRADICTS THIS COURT'S RULING IN WEINBERGER v. ROMERO-BARCELO

A. The Ninth Circuit Has Established a Per Se Rule for Granting Injunctive Relief When an Environmental or Conservation Statute Appears to Have Been Violated

Despite respondent People of the Village of Gambell's protestations to the contrary,[2] it is clear beyond a doubt

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[1] Amici are in full agreement with petitioners that the Ninth Circuit erred in ruling that ANILCA applies to the OCS, and adopt petitioners' statement of this issue and their arguments addressed to it. Amici only argue in the alternative that if this Court should accept the Ninth Circuit's position in applying ANILCA to the OCS, that court's application is contrary to the requirements of *Secretary of the Interior v. California*.

[2] *See, e.g.*, respondent's Brief in Opposition to Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 28.

from the language employed by the Ninth Circuit in *People of the Village of Gambell v. Hodel* (*Gambell II*), 774 F.2d 1414 (9th Cir. 1985), as well as from other recent cases in the Ninth Circuit involving the granting of injunctive relief,[3] that the Ninth Circuit has fashioned a per se rule requiring the granting of an injunction when the moving party succeeds in making a nonfrivolous showing of the violation of an environmental or conservation statute.

In *Gambell II* the Ninth Circuit reviewed the District Court's discretionary refusal to enjoin exploratory drilling under Lease Sale 57 in Norton Sound and Lease Sale 83 in the Navarin Basin, both off the coast of Alaska. *Gambell II*, 774 F.2d at 1417-18. The District Court's action was based on its specific findings:

> "(1) Movants have established a strong likelihood of success on the merits.
>
> "(2) The balance of irreparable harm does *not* favor the movants.
>
> "(3) The public interest favors continued oil exploration, for the reason that the national interest favors OCS [outer continental shelf] oil exploration and such exploration will not cause the type of harm, a restriction in subsistence uses or resources, that ANILCA was designed to prevent." *Id.* at 1418 (emphasis in original).

Thus, the District Court engaged in just that process intended to " 'balance the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction' "

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[3] *See, e.g., Steamboaters v. Federal Energy Regulatory Commission*, 777 F.2d 1384 (9th Cir. 1985); *Tenakee Springs v. Block*, 778 F.2d 1402 (9th Cir. 1985); *Tribal Village of Akutan v. Hodel*, No. 86-3512 (9th Cir. 1986) (order sustaining preliminary injunction).

which this Court has consistently required. *See Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312 (1982), *citing Yakus v. United States,* 321 U.S. 414, 440 (1944). This process proved unacceptable to the Ninth Circuit.

The Ninth Circuit found the District Court's refusal of injunctive relief "not consistent with the law of this circuit," *Gambell II,* 774 F.2d at 1422, because the District Court had denied the requested injunction "[n]otwithstanding its [*i.e.,* the District Court's] determination that the Secretary violated the procedural requirements of section 810(a) of the Conservation Act." *Id.* The District Court's "inconsistent" exercise of the usual equitable discretion was improper because the law of the Ninth Circuit is that "[a]n injunction is the *appropriate remedy* for a substantive procedural violation of an environmental statute." *Id., citing Thomas v. Peterson,* 753 F.2d 754, 764 (9th Cir. 1985) (emphasis added). Once a prima facie violation is made out, a District Court in the Ninth Circuit commits legal error in not awarding injunctive relief.

Furthermore, the dimensions of any remaining "discretion" in the District Court under the Ninth Circuit's "appropriate" standard shrink to practical nonexistence; it is clear from *Gambell II* that "appropriate" actually means "required." Thus, in concluding that the District Court's justifications for denying the requested injunction were "inappropriate," 774 F.2d at 1423, the Ninth Circuit decided that none of the proffered justifications

> "excuse its *duty to issue an injunction* in light of its determination that there was a strong likelihood that the Villages would prevail in their contention that section 810(a) of the Conservation Act had been violated." *Id.* (emphasis added).

Once the appropriate showing of violation is made, the duty to enjoin matures simultaneously.

Moreover, even were this Court inclined to overlook language that speaks of equitable remedies in terms of an absolute, nondiscretionary "duty," the Ninth Circuit's overall approach completely inverts the scheme of equitable relief that this Court has painstakingly created through the years. In *Weinberger v. Romero-Barcelo, supra,* the Court noted that "[i]t goes without saying" that equitable remedies do not issue " 'as of course.' " *Id.* at 311, *citing Harrisonville v. W. S. Dickey Clay Manufacturing Co.,* 289 U.S. 334, 337-38 (1933). " 'Flexibility rather than rigidity has distinguished it [equitable relief].' " *Weinberger,* 456 U.S. at 312, *citing Hecht Company v. Bowles,* 321 U.S. 321, 329 (1944). This must be so because "a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger,* 456 U.S. at 313, *citing Tennessee Valley Authority v. Hill, (TVA),* 437 U.S. 153, 193 (1978), *Hecht v. Bowles,* 321 U.S. at 329.

But just this proscribed sort of mechanical regimentation is forced upon district courts in the Ninth Circuit when the apparent violation of an environmental or conservation statute is at issue. Rather than affording the District Court sitting in equity that " 'full opportunity . . . to treat enforcement proceedings . . . in accordance with their traditional practices as conditioned by the necessities of the public interest,' " *Weinberger,* 456 U.S. at 320, *citing Hecht,* 321 U.S. at 330, as this Court has required, the practice of the Ninth Circuit actually requires the District Court to attempt, however futilely, to "*justif*[*y*] *the denial* of a preliminary injunction," *Gambell II,* 774 F.2d

at 1425 (emphasis added), when a showing of probable success on the merits has been made.[4] Clearly, the Ninth Circuit's unique rule constitutes a per se requirement of injunctive relief.

B. The Ninth Circuit's Per Se Rule Subverts the Statutory Analysis Required By This Court in Weinberger v. Romero-Barcelo

In *Weinberger v. Romero-Barcelo, supra,* this Court overturned a decision of the First Circuit requiring the District Court for the District of Puerto Rico to issue an injunction for a violation of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1251, *et seq.* In reaching its decision overruling the First Circuit, the Court considered and rejected arguments that the decision then *sub judice* was controlled by the Court's prior decision in *TVA v. Hill, supra. See Weinberger,* 456 U.S. at 310, 314-18.

Rather than blindly relying on the result in *TVA v. Hill,* the Court began its analysis with an examination of traditional equitable principles, *see Weinberger,* 456 U.S. at 311-13, noting that the traditional discretion of federal equity courts was subject to modification by Congress: "Of course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles." *Id.* at 313, *citing Hecht,* 321 U.S. at 329.

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[4] The futility derives from the extreme unlikelihood that a District Court will be able to bring any particular set of factual circumstances within the only two grounds for denial, viz., that an injunction will actually harm the environment or interrupt the performance of long-term contracts. *See Gambell II,* 774 F.2d at 1424-25.

The modification power reposed in Congress necessitates a scrutiny of the statutory scheme (for which enforcement is being sought) for guidance on the dimensions of equitable discretion under the statute: " 'Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a *clear and valid legislative command.*' " *Weinberger,* 456 U.S. at 313, *citing Porter v. Warner Holding Co.,* 328 U.S. 395 (1946) (emphasis added). The Court's analytical framework was set by the conclusion that the statutory scheme must be explicit in its intent to limit equitable discretion: " '*Unless a statute in so many words, or by a necessary and inescapable inference,* restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.' " *Id.* (emphasis added).

The Ninth Circuit in *Gambell II* made no use whatsoever of this method. Rather, the principle from which ANILCA's requirements were viewed was that "a preliminary injunction should issue where a federal agency has violated the procedural requirements of an environmental protection or conservation statute," *Gambell,* 774 F.2d at 1428, *i.e.,* without the *Weinberger* scrutiny of the specific equitable orientation of the statute at issue. That this is the case in the Ninth Circuit is well illustrated by the contradictory position reached by the court concerning the unsuitability of the Secretary's National Environmental Policy Act (NEPA) subsistence use impact study to fulfill the subsistence use evaluation required by ANILCA. *See Gambell II,* 774 F.2d at 1420-22.

While denying the Secretary the opportunity to utilize the subsistence use impacts study performed for NEPA

compliance to satisfy the subsistence use evaluation required by ANILCA, the court noted that

> "[w]e previously have held that 'compliance with one environmental statute does not assure compliance with another.' Where each statute mandates separate and distinct procedures, compliance with the requirements of one does not compel the conclusion that the provisions of the other statute were considered. Neither the Environmental Act [NEPA] nor the Lands Act [Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA)] sets forth procedures to ensure the protection of subsistence needs and uses. In contrast, the Conservation Act [ANILCA] was created 'to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.'
>
> "As we noted in *Gambell I* [*People of the Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984)], 'Congress found that continuation of the opportunity of rural Alaskans to make subsistence use of fish and wildlife "is essential to [their] existence".' *The separate and distinct procedures* set forth in section 810(a) of the Conservation Act were enacted to fulfill that purpose. *The Environmental Act and the Lands Act do not, by their terms, seek to advance the same Congressional goals.*" *Gambell II*, 774 F.2d at 1421 (emphasis added; citations omitted).

Yet these widely differing statutes receive the same treatment without *Weinberger* scrutiny on the question of the propriety of preliminary injunctive relief. The court recognizes that the congressional goals to be achieved and the procedures required to meet those goals were "separate and distinct," but in furtherance of its per se rule ignores these differences when the issue is the equitable discretion of a reviewing court. This method does not so much violate *Weinberger* as loftily ignore it.

The clear teaching of *Weinberger* is that such an *a priori* rule limiting equitable remedies under a statutory scheme is immediately suspect. The scheme itself must first be examined for indications of congressional intent regarding the extent of permissible equitable relief. The Ninth Circuit's per se rule renders this required statutory scrutiny impossible of accomplishment. In its disregard of congressional intent and complete indifference to the careful weighing of inferences flowing from a statute's internal structure that the Court relied on in *Weinberger*, the Ninth Circuit's insensitive proactive approach is completely alien to this Court's express requirements.

II

THE DECISION OF THE NINTH CIRCUIT REQUIRING THE FULL PROCEDURAL APPARATUS OF ANILCA § 810(a)(1)-(3) AT THE LEASE SALE STAGE OF OCS DEVELOPMENT FOR SUBSISTENCE USE IMPACTS THAT MAY OCCUR ONLY AT SUBSEQUENT STAGES OF EXPLORATION AND PRODUCTION/DEVELOPMENT IS CONTRARY TO THIS COURT'S RULING IN SECRETARY OF THE INTERIOR v. CALIFORNIA

A. The Secretary's Subsistence Use Evaluation Meets This Court's Requirements for Tiered Environmental Review of OCS Activities

In *Secretary of the Interior v. California*, 464 U.S. 312 (1984), this Court reviewed the requirements of the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. § 1451, *et seq.*, in the context of OCS development activities. In order to resolve the issues then before it, the Court found it appropriate to examine the structure and policy of OCSLAA, 43 U.S.C. § 1331, *et seq.*, "for a clarification

of the differences between a lease sale and the approval of a plan for 'exploration,' 'development,' or 'production.'" *Secretary of the Interior v. California*, 464 U.S. at 336. The Court found that in recognizing the above differences "Congress had thus taken pains to separate the various federal decisions involved in formulating a leasing program," *id.* at 340, and the separate federal decisions represented "distinction[s] that Congress has codified *with great care.*" *Id.* at 336 (emphasis added). The decision of the Ninth Circuit in *Gambell II* completely obliterates these carefully crafted congressional distinctions.

The Supreme Court identified the effect and purpose of the tiered structure of OCS activities under OCSLAA as follows:

> "Each stage involves *separate regulatory review* that may, but need not, conclude in the transfer to lease purchasers of rights to conduct additional activities on the OCS. *And each stage includes specific requirements for consultation with Congress, between federal agencies, or with the States.*
>
> . . . .
>
> ". . . [T]he purchase of an OCS lease, standing alone, entails *no right to explore for, develop, or produce oil and gas resources on the OCS.* . . . The stated reason for this four-part division was *to forestall premature litigation regarding adverse environmental effects that all agree will flow, if at all, only from the latter stages of OCS exploration and production.*" *Secretary of the Interior v. California*, 464 U.S. at 337, 340-41 (emphasis added).

The Court could not have said more plainly that regulatory review, including environmental review of OCS activities, was to proceed at the pace of the activities themselves as

permitted under OCSLAA. Environmental review conducted in this manner would minimize threats of unripe litigation. The Ninth Circuit in *Gambell II* has consciously ignored the teaching of *Secretary of the Interior v. California* with precisely those undesirable results the Court foresaw.

The Secretary's Section 810(a) evaluation for Lease Sale 57 specifically found that it "has not and will not significantly restrict subsistence uses." *See* Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (filed by petitioner Secretary of the Interior in this matter), Appendix J at 85a. Relying on *Secretary of the Interior v. California,* the evaluation indicated that the extent of its required Section 810(a) inquiry was limited to considering the effects of the lease sale stage of OCS development,[5] but went on to include a hypothetical assessment of subsistence use restrictions at the subsequent stages of exploration and development/production as well. Appendix J at 84a. The evaluation justified this treatment by noting:

> "Since each of these stages has a different probability of occurring as well as a different potential for affecting the environment, this division will also better identify the possible restrictions of each stage on subsistence uses. Future stages are evaluated to the extent possible at this time. *We emphasize that, at present, no development and production plans have been proposed.* For this reason, the discussion of

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[5] "Recent case law distinguishes the lease sale from other stages of OCS development, i.e., exploration, development and production. Thus, we are required to consider at this stage only the effects of the lease sale, and not the effects of exploration or development and production." Appendix J at 84a.

the development & production stage is based on the hypothetical scenarios and oil-spill-risk-analysis included in the 57 FEIS (USDOI MMS 1982).

> "To repeat, however, we are not required to consider anything other than the lease sale (and associated preliminary activities) at this stage. *Therefore, the discussion of subsequent stages (exploration, development & production) should not be viewed as the final 810 evaluation for those stages, and should not be regarded as a statement of events which will actually occur.*" *Id.* at 84a-85a (emphasis added).

Thus, the Secretary's methodology in evaluating possible subsistence use restrictions as a result of OCS activities tracked precisely with this Court's assessment of congressional intentions under OCSLAA.

B. The Ninth Circuit's Failure to Follow Secretary of the Interior v. California Is Unjustifiable

But the Ninth Circuit was not persuaded. Noting that the Secretary's necessarily hypothetical evaluation of *future* subsistence use restrictions at the *development/production stage* had identified possible significant restrictions, the court required the full panoply of Section 810(a)(1)-(3) procedures to be undertaken at the *lease sale stage:*

> "We made it clear in *Kunaknana* [*v. Clark,* 742 F.2d 1142 (9th Cir. 1984)] that under the express language of section 810(a)(3), the Secretary was required to comply with the notice and hearing requirements of the statute to determine *inter alia* whether ' " such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands." ' 742 F. 2d at 1150-51 (*quoting* section 810(a)(3))." *Gambell II,* 774 F.2d at 1422.

The court identified two reasons for not following the tiered analysis mandated by this Court in *Secretary of the Interior v. California, supra:* the inapplicability of the analysis found in *Secretary of the Interior;* and the control, by way of exception, of the "specific" requirements of ANILCA over the "general" requirements of OCSLAA. *Gambell II,* 774 F.2d at 1422. These asserted justifications for not conforming to this Court's requirements are erroneous for the following reasons.

1. The Tiered Decision Making Structure of OCSLAA Controls ANILCA Procedures Exactly As It Controls Endangered Species Act and National Environmental Policy Act Procedures

There is no basis for the position that the Court's analysis of congressional purpose underlying the four-part division of development activities on the OCS is limited to the interactions of OCS activities with the single statutory scheme of the CZMA. The fact that the Court in *Secretary of the Interior v. California* did not have before it the requirements of Section 810(a) of ANILCA is immaterial; the Court was announcing the effects of the 1978 amendments to the Outer Continental Shelf Lands Act as much as it was specifying the reach of the CZMA. The attempt to limit the applicability of *Secretary of the Interior* to CZMA-related procedures is arbitrary, superficial, and clearly erroneous.

Moreover, less than 18 months prior to its decision in *Gambell II* the Ninth Circuit had expressed precisely the opposite opinion in a case entirely missing from the *Gambell II* analysis. In *Village of False Pass v. Clark,* 733 F.2d 605 (9th Cir. 1984), the court established the

methodology for applying the procedural requirements of the Endangered Species Act (ESA) and NEPA to OCS activities. In that case the Ninth Circuit had no problem finding that ESA and NEPA procedures were governed by OCSLAA in the manner prescribed by this Court in *Secretary of the Interior v. California:*

> "The Supreme Court recently explained the basic structure of OCSLA in *Secretary of the Interior v. California,* — U.S. —, 104 S.Ct. 656, 78 L.Ed.2d 496 (1984). . . . Although the present case applied OCSLA in a different factual situation, *there is no doubt that we are bound by the Court's analysis of OCSLA." Village of False Pass,* 738 F.2d at 608 (emphasis added).
>
> "Thus, it is clear that OCSLA prescribes three distinct stages for offshore oil and gas activities: leasing, exploration, and development and production. . . . *Our analysis of this case, therefore, requires us to take into consideration the three separate stage approach of OCSLA." Id.* at 609 (emphasis added).

The absence of any reference to this language from *Village of False Pass* in *Gambell II* therefore is the more puzzling. The *Gambell II* court may be understood as either reversing *Village of False Pass sub silentio* or limiting it to the specific statutes at issue in that case. Either interpretation is forbidden by the plain import of this Court's decision in *Secretary of the Interior v. California.*

2. The Appeal to Statutory Construction Aids Is Flawed

The principles of statutory construction advanced by the court are inapplicable. In refusing to order compliance with the procedural requirements of Section

810(a)(1)-(3) of ANILCA within the tiered decision-making structure of OCSLAA, the Ninth Circuit found ANILCA to be excepted from the entire OCSLAA process:

> "In the Conservation Act [*i.e.*, ANILCA], however, Congress has expressly provided for a *specific and detailed procedure* to be followed in evaluating the impact on subsistence use of the lease of public land for exploratory activities. . . . 'It is a basic rule of statutory construction that a specific statute controls over a general statute.' . . .
>
> ". . . [T]he specific procedural requirements of section 810(a)(1)-(3)—which are triggered by the threat of a significant restriction of subsistence use—were intended by Congress to serve as *an exception to the general provisions of the Lands Act* [*i.e.*, OCSLAA]." *Gambell II*, 774 F.2d at 1422 (emphasis added; citations omitted).

Aside from the complete incompatibility of this rationale with the *Village of False Pass* decision finding two other equally specific and detailed environmental enactments, ESA and NEPA, to be within the OCSLAA procedural ambit, the stated principle of statutory construction is inapplicable to the interrelationships between ANILCA and OCSLAA.

First, the statement of the rule of specific enactments controlling general ones as formulated above is seriously incomplete. As the Ninth Circuit itself has previously recognized, a specific statute controls a general one only to the extent of irreconcilable conflict: "[P]rinciples of construction requiring the more recent and specific statute to prevail over the earlier and more general only apply when *there is an irreconcilable conflict* between statutes." *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 490 n.8 (9th Cir. 1984), *citing Watt v. Alaska*, 451 U.S. 259, 266 (1981). The court made absolutely no effort to demonstrate any such

irreconcilable conflict between ANILCA's Section 810(a) requirements and the tiered decision-making structure of OCSLAA.[6] Thus, the invocation of the aid to construction is not ripe.

Second, the invocation of the preference for later "specific" enactments over earlier more "general" ones amounts to the assertion of an implied repeal *pro tanto* of the allegedly conflicting portions of the earlier OCSLAA. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) (statutes in irreconcilable conflict justify implied repeal). Such implied repeals are disfavored. *American Bank and Trust Co. v. Dallas County*, 463 U.S. 855, 868 (1983). Rather, the reviewing court has a duty to harmonize the apparently conflicting statutes, and to give effect to each where possible to do so. *Watt v. Alaska, supra; accord Get Oil Out! Inc. v. Exxon Corporation*, 586 F.2d 726 (9th Cir. 1978): "It is our obligation to so construe federal statutes *so that they are consistent with each other*, as by this means *congressional intent can be given its fullest expression.*" *Id.* at 729. The Ninth Circuit has made no effort to harmonize ANILCA and OCSLAA and give effect to both, although its own precedent requires it to do so. Under these conditions of complete failure either to demonstrate irreconcilable conflict between ANILCA's Section 810(a)(1)-(3) procedures and OCSLAA's tiered decision-making structure, or to attempt to harmonize the above provisions of the acts, the Ninth

---

[6] Indeed in *Village of False Pass*, the Ninth Circuit found OCSLAA and other detailed environmental schemes to be not merely *not irreconcilable*, but rather, to be positively "complementary." *See id.* at 609, 612.

Circuit's assertion of ANILCA's exception from the structure of OCSLAA is erroneous.

C. Failure to Follow Secretary of the Interior v. California Results in Waste and Redundancy of Environmental Review

Finally, it should be noted that the Ninth Circuit's refusal to be bound by this Court's decision in *Secretary of the Interior v. California* in the context of ANILCA's Section 810(a) requirements has the further unfortunate result of rendering superfluous a specific subsequent portion of ANILCA. Section 810(b) of the Act provides:

> "If the Secretary is required to prepare an environmental impact statement pursuant to section 4332(2)(C) of Title 42, he shall provide the notice and hearing and include the findings required by subsection (a) of this section *as part of such environmental impact statement.*" *Id.* (emphasis added).

It is well established that NEPA applies at all the discrete stages of the tiered OCSLAA process. *Village of False Pass, supra.* As noted so many times above, staged application of regulatory review is implicit in the carefully crafted nature of OCS development decision making. However, a requirement that the Secretary conduct the full panoply of Section 810(a)(1)-(3) procedures at the lease sale stage would render the subsequent evaluations at the exploration and development/production stages redundant or superfluous. The command of Section 810(b) that makes perfect sense when review is performed as necessary and appropriate is rendered useless and nugatory by the Ninth Circuit's construction. A statutory interpretation that results in surplusage or absurdity is to be avoided. *Bell v. New Jersey,* 461 U.S. 773 (1983); *American Tobacco Co. v. Patterson,* 456 U.S. 63 (1982).

III

BY ASSERTING THAT UNDER THE PROVISIONS OF ANILCA CONGRESS HAS DECIDED TO FAVOR NATIVE ALASKANS' SUBSISTENCE NEEDS AND CULTURE OVER NATIONAL ENERGY NEEDS, THE NINTH CIRCUIT HAS USURPED THE FUNCTION OF POLICY FORMULATION THAT BELONGS SOLELY TO CONGRESS

As shown above in Section I.B., the Ninth Circuit in *Gambell II* refused to perform the scrutiny of statutory structure and purpose this Court required in *Weinberger v. Romero-Barcelo* for determining the extent of equitable discretion in statutory enforcement. Nevertheless, the court did engage in statutory analysis of a sort for the purpose of justifying the per se rule governing environmental/conservation act injunctions it had earlier announced. That "analysis," however, is based on a spurious reading of ANILCA that ignores legislative history and intrudes into the sphere of policy formulation reserved by the Constitution for Congress.

The Ninth Circuit attempted to bolster its newly announced per se rule by appealing to this Court's analysis in *TVA v. Hill, supra. See Gambell II*, 774 F.2d at 1426 n.2. Quoting this Court's words in *Weinberger v. Romero-Barcelo, supra,* in summary of its position in *Tennessee Valley Authority v. Hill* that "Congress, it appeared to us, had chosen the snail darter over the dam," *Gambell II*, 774 F.2d at 1426 n.2, *citing Romero-Barcelo,* 456 U.S. at 314, the Ninth Circuit then brought forward the startling analogy that "[i]t appears to us that in enacting section 810, *Congress has chosen the protection of subsistence life over oil exploration.* Thus, only the issuance of a preliminary injunction to compel compliance with the requirements of Section 810 can uphold Congressional intent." *Id.*

(emphasis added). The Ninth Circuit amplified its conclusion later on:

> "The public interest as expressed by Congress in the 1980 amendments to the Conservation Act [*i.e.*, ANILCA] requires that *the uses and needs of the Alaskan Natives, and our national concern over survival of their culture, must prevail over our possible energy needs.* Thus, the denial of a preliminary injunction was error because the court misapplied the law of the circuit concerning the 'unusual circumstances' exception and failed to honor *the announced policy of Congress favoring the rights of Alaskan Natives over this nation's need to exploit the potential oil resources under the waters of the outer continental shelf off the shores of Alaska.*" *Gambell II*, 774 F.2d at 1428 (emphasis added).

No such public interest has been expressed by Congress, nor has Congress announced such a policy. Both the expression and announcement represent the bald policy assertions of the Ninth Circuit in direct contradiction of congressional intent.

The Ninth Circuit's position amounts to a *substantive* preference for subsistence uses under Section 810(a) of ANILCA. But by the Ninth Circuit's own estimation, Section 810(a) creates *procedural* duties and rights only. *Gambell II*, 774 F.2d at 1422. This distinction is borne out by the legislative history. Senate Report No. 413, 96th Cong., 2d Sess. 5, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, sets out the text with commentary of the legislation that eventually became ANILCA. In discussing the amendments made by the Senate Committee on Energy and Natural Resources to the text of the House of Representatives' bill, H.R. No. 39, the report notes:

> "The second amendment [to Section 810] clarifies that the requirements of Section 810 are '*procedural*' in that until the requirements of the section have been satisfied the proposed action may not proceed, but once the requirements of the section are satisfied and incorporated into existing land use planning processes *the proposed action may proceed even though its effect may be adverse to subsistence uses.*" *Id.* at 5178 (emphasis added).

In *Gambell II* the court nowhere acknowledged this language nor incorporated it into its analysis of congressional policy underlying ANILCA.[7]

The federal courts are without authority to engage in this sort of substitutionary policy formulation. This Court has unmistakably indicated that it will not overturn the policy choices Congress has made:

> "In dealing with problems of interpretation and application of federal statutes, we have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers. Where congressional intent is discernible—and here it seems crystal clear—we must give effect to that intent." *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195, 215 (1962), *overruled on other grounds,* 398 U.S. 235 (1970).

Likewise, in this instance it is crystal clear that Congress has established *procedural* requirements under ANILCA that express no *substantive* preference for subsistence uses over necessary energy development.

---

[7] This is especially surprising since the court quoted this very language in its earlier decision in *Gambell I* for this very principle, viz., the procedural nature of the Section 810(a) requirements with the real possibility of adverse impacts on subsistence uses upon completion of the required process. *See People of the Village of Gambell v. Clark,* 746 F.2d 572, 582 (9th Cir. 1984).

The rationale for such restraint is ably set out by the court in *McCoy v. Thorn*, 451 F. Supp. 351 (W.D. La. 1978):

> "It is for legislators, not judges, to decide important matters of public policy. It is for judges, independently and without fear of political reprisal, to interpret the law after the people, through the Constitution or through their elected representatives, have decided what public policy should be.
>
> "Once the judiciary embarks on a course of policy determination beyond the mere interpretation of law, it erodes the democratic process. Independent policy determination by a court violates the principle, embodied in the Constitution and proclaimed in the Declaration of Independence, that a political sovereign derives its power solely from the people." *Id.* at 352.

In attempting to justify its rule of per se injunctive relief upon a showing of violation of an environmental or conservation statute, the Ninth Circuit in *Gambell II* crossed the line into impermissible policy formulation in defiance of congressional intent. The Court should firmly direct it away from this error.

CONCLUSION

The Ninth Circuit used the occasion of its decision in *Gambell II* to announce a per se rule granting injunctive relief upon a showing of probable violation of an environmental or conservation statute. Such a per se rule is in violation of this Court's express directions given in *Weinberger v. Romero-Barcelo, supra,* and should be over turned. The Ninth Circuit has erroneously interpreted ANILCA to create an implied repeal of OCSLAA, and has

usurped the policy formulating role of Congress. Amici respectfully request this Court to correct these errors.

DATED: July, 1986.

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Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, *et al.*,
Respondents.

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STATE OF CALIFORNIA EX REL. JOHN K. VAN DE KAMP, ATTORNEY GENERAL, AND THE STATES OF ALASKA, DELAWARE, FLORIDA, HAWAII, KANSAS, NEW MEXICO, OKLAHOMA, SOUTH CAROLINA, TEXAS, VIRGINIA, AND WISCONSIN

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QUESTION PRESENTED

Does the Ninth Circuit's standard for issuance of an injunction for substantial violation of Alaska National Interest Lands Conservation Act section 810 properly reflect Congress's determination to protect subsistence uses and its creation of a single mechanism to provide for subsistence use protection?

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Amici respectfully submit this brief pursuant to Rule 36.4 of the Rules of the United States Supreme Court, in support of respondent, People of the Village of Gambell.

INTERESTS OF AMICI

The states which have joined as amici in this brief share a deep and abiding concern for the continued diligent

enforcement of environmental statutes. Injunctive relief, as a remedy to statutory violation and as tool to maintain the status quo pending final judicial determination, forms a pivotal element of environmental enforcement, both in obtaining full statutory compliance and in achieving deterance.

Amici believe that this litigation concerns the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101-3233 (1982) (ANILCA), exclusively. While ANILCA itself, as the statutory protector of irreplaceable resources and the way of life of Alaska rural subsistence users, *see* 16 U.S.C. §§ 3110-3120, embodies elements of concern and interest to amici, amici are most concerned about petitioners' attempt to frame the issues before the Court as encompassing the availability of injunctive relief under "environmental statutes" generally. Amici benefit from laws such as ANILCA, the National Environmental Protect Act (NEPA), 42 U.S.C. §§ 4321-4361 (1982) and the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982), and are directly affected by the availability of injunctive relief for violations of those statutes.

Petitioners' misreading of ANILCA and their attempt to apply holdings specific to ANILCA section 810 to other environmental statutes directly implicate the interest of amici and form the basis for amici's participation. While amici believe that ANILCA sets the parameters of this case, the petitioners' attempt to expand the case beyond the confines of ANILCA provides the major impetus for the participation of amici.[1]

---

1 The State of Alaska, which joins in this brief, of course, considers the issue of the proper injunction standard for an ANILCA section 810 violation of sufficient significance, standing alone, for its participation in this case.

SUMMARY OF ARGUMENT

Upon determining that the Secretary of the Interior, as a matter of strong likelihood, substantially violated the Alaska National Interest Lands Conservation Act (ANILCA) section 810, the district court must decide the appropriate remedy. While courts exercise equitable discretion in forming a remedy, the violated statute both limits and defines the discretionary boundaries. The courts must order relief in light of the objectives of the statute, bearing in mind congressional purpose, policy, and mandate. The courts' equitable discretion applies only to the formulation of remedies; the courts have no discretion to deny a remedy altogether, thereby denying enforcement of a legislative act.

Congress has the power to completely control judicial equitable discretion, and it has the power to guide and limit the exercise of the courts' discretion through its statutory enactments. In determining the appropriate remedy for an ANILCA section 810 violation, the Court must look to ANILCA itself to discern congressional policy and the appropriate parameters of equitable discretion.

ANILCA presents a clear policy for protection of subsistence uses of Alaska rural residents. The statutory provisions apparently violated by the Secretary of the Interior form the sole mechanism for meaningful particiation by Alaska rural subsistence users in the subsistence management process. Failure to follow the ANILCA section 810 procedures skews the entire decision-making process and could seriously jeopardize subsistence uses. Congress's intent is clearly stated in ANILCA itself and in its legislative history: subsistence uses should be protected, and the mechanism codified by ANILCA section 810 represents the only manner congressionally determined as appropriate to

provide that protection. ANILCA section 810 severely limits equitable discretion as part of its protection of subsistence uses.

The Ninth Circuit's standard for issuance of an injunction for an ANILCA section 810 violation properly reflects the limits on discretion imposed by ANILCA. The Ninth Circuit standard imposes a presumption which the Secretary of the Interior must overcome to avoid the injunction. In this manner, the Ninth Circuit is sensitive to Congress's strong policy of protecting subsistence uses, while maintaining its discretion to deny injunctions in unusual cases.

ARGUMENT

I. INTRODUCTION

In *People of the Village of Gambell v. Hodel*, 774 F.2d 1414 (9th Cir. 1985), the Court of Appeals affirmed the District Court's finding that the Villagers of Gambell established a strong likelihood of success on the merits—that the Secretary of the Interior substantially violated section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120 (1982). 774 F.2d at 1422. Having so determined, the court considered the best method of achieving compliance with ANILCA section 810 in light of Congress's expressly stated policy of protecting the subsistence uses and culture of Alaska rural residents. 16 U.S.C. § 3114 (1982).

Similarly, this Court should reach the question of the propriety of the issuance of an injunction in this case, and

the standard under which an injunction issues for ANILCA section 810 violations generally, only after it determines that the district court and the court of appeals properly found that the Villagers have a strong likelihood of success on the merits. Amici assume in the discussion that follows that the Secretary of the Interior substantially violated ANILCA section 810, and that the Court must decide the proper remedy.

II. ONCE THE COURT DETERMINES THAT, AS A MATTER OF STRONG LIKELIHOOD, THE SECRETARY OF THE INTERIOR VIOLATED ANILCA SECTION 810, ONLY THE QUESTION OF HOW BEST TO ACHIEVE STATUTORY COMPLIANCE REMAINS

A. The Court Must Look to ANILCA to Determine the Parameters of Its Equitable Discretion In Forming an Appropriate Remedy

In *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), the Court held that Congress preempted the application of federal common law by adopting a comprehensive regulatory scheme, specifically the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151-1376. 451 U.S. at 317. The Court found that the appropriate division of functions between the Judiciary and Congress applies to the courts' ability to form federal common law. 451 U.S. at 312; *see Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (federal courts are not courts of general common law). Thus, courts may not "'judicially decree [ ] what accords with "common sense and the public weal"' when Congress has addressed the problem." *City of Milwaukee*, 451 U.S. at 315, *quoting TVA v. Hill*, 437 U.S. 153, 195 (1978).

Congress has left no doubt that, with respect to the federal interest in the public lands of Alaska, ANILCA

occupies the field through a comprehensive regulatory scheme; with respect to the conservation units established by the Act

> "[ANILCA] provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and this Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby."

16 U.S.C. § 3101(d) (Congressional statement of purpose). ANILCA establishes a preference for subsistence use of fish and wildlife on federal lands. 16 U.S.C. §§ 3114, 3115. ANILCA defines the subsistence uses of rural Alaskans and it determines the protections afforded those uses. 16 U.S.C. §§ 3113, 3114, 3120. Judicial remedies for violation of the subsistence use protection embodied in ANILCA must be consistent with congressional purpose. *See City of Milwaukee,* 451 U.S. at 312 (federal rules in "areas of national concern" are made by Congress—not the courts).

Although *City of Milwaukee* concerns the preemption of federal common law by a comprehensive regulatory scheme, the Court's citation of *TVA v. Hill,* 437 U.S. 153, 194-95 (1978), strongly suggests that a similar analysis applies to the courts' equitable jurisdiction, albeit somewhat

more selectively. *See e.g., Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-17 (1975) (statutes guide and limit equitable discretion). *City of Milwaukee* and ANILCA's statement of purpose make clear that ANILCA is the only relevant source of law and the only relevant source for determining the appropriate level of discretion (if any) applicable to formation of the remedy with respect to an ANILCA violation.

B. Statutory Violation Requires Statutory Compliance, and Any Remedy Must Be Consistent With the Statute

Assuming that the lower courts properly determined that, in all likelihood, the Secretary of the Interior substantially violated ANILCA section 810, only the question of remedy remains. The Court cannot decide simply to ignore conduct violative of ANILCA section 810; some remedy, both consistent with and in furtherance of ANILCA must be implemented. *See United States v. American Tobacco Co.*, 221 U.S. 106 185 (1910) (discretion of courts bounded by "duty of giving complete and efficacious effect to the prohibition of the statute."); *see also Gilbertville Trucking Co., v. United States*, 371 U.S. 115, 130 (1962). Failure to remedy the statutory violation would defeat congressional mandate and reformulate courts as legislators. *See Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 866 (1824) ("When [courts] are said to exercise a discretion it is a mere legal discretion, a discretion to be exercised in discerning the course of the law. . . . Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for purpose of giving effect to the will of the Legislature; or, in other

words, to the will of the law.'') Any ''balancing'' that occurs concerns the appropriateness of a particular remedy, not whether the violation should be remedied. *See Romero-Barcelo,* 456 U.S. at 320 (FWPCA permits the district court to order relief necessary to secure *prompt* compliance with the Act); *Hecht Co. v. Bowles,* 321 U.S. 321, 326 (1944) (because an injunction would have ''no effect by way of insuring better compliance in the future'' it was inappropriate).

Determination of the proper remedy for statutory violation depends on Congress's purposes underlying and defining the statute. *See, e.g., Albemarle,* 422 U.S. at 426; *Hecht,* 321 U.S. at 331 (the court exercises its power ''in light of the large objectives of the Act''). ANILCA and other environmental statutes—particularly in light of the often sensitive nature of the environment itself as well as the decision-making process preceding projects affecting the environment—present cases in which courts must take special care in considering congressional intent in determining remedies for statutory violations. *See* discussion in §§ VI, VII infra.

III. CONGRESS HAS THE AUTHORITY TO LIMIT JUDICIAL EXERCISE OF EQUITABLE DISCRETION

A. The Violated Statute Forms the Limits of the Appropriate Remedy

Congress can, and does, limit judicial equitable discretion. *See, e.g., United States v. Rodgers,* 461 U.S. 677, 709 (1983); *Romero-Barcelo,* 456 U.S. at 320; *TVA v. Hill,* 437 U.S. at 194-95; *Albemarle,* 422 U.S. at 415-17; *Arizona v. California,* 373 U.S. 546, 565-66 (1963); *Hecht,* 321 U.S. at 329. In *TVA v. Hill,* 437 U.S. at 194-95, the Court found

that Congress can remove equitable jurisdiction from courts in its entirety:

> "Congress has spoken in the plainest of words. . . . Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end."

Thus, even in the face of what the district court termed an "absurd result," *id.* at 196 (Powell, J. dissenting), the Court could not "preempt congressional action by judically decreeing" a "common sense result." *Id.* at 195. *TVA v. Hill* leaves no doubt that the exercise of congressional power limits judicial equitable remedies, and, at times, forecloses all discretion upon a finding of statutory violation.

In most instances, Congress does not foreclose all judicial equitable discretion. *E.g., Romero-Barcelo,* 456 U.S. at 313 (preclusion of all equitable discretion "not lightly assumed"). However, statutes define and limit the courts' power to formulate remedies. *See, e.g., id., Albemarle,* 422 U.S. at 415-17.

The courts' role in enforcing statutory compliance places the statutory scheme with its congressional purposes and goals along side the courts' equitable powers, with the statute defining and limiting equitable discretion. In fact, the issue of the proper standard by which to evaluate the propriety of injunctive relief in light of the probable statutory violation can usefully be framed as an attempt to determine the proper accomodation between congressional statutory mandate and judicial equitable discretion. *See Id.* The courts' balance of competing interests to determine the appropriate means of compliance with congres-

sional mandate, requires, in essence, a policy decision (albeit a *judicial* policy decision). This is particularly true in cases of violations of environmental statutes. *See* discussion § VI infra. Because the courts engage in balancing, they must have congressional mandate clearly in mind and their discretion must embody statutory dictates.

The Court's cases give guidance as to the proper accomodation of statutory mandate and equitable discretion. In *Albemarle*, 422 U.S. at 405, 415-417, for example, the Court, discussing equitable relief in Title VII cases, stated:

> [S]uch discretionary choices are not left to a court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *United States v. Burr*, 25 F. Cas. 30, 35 (CC Va 1807) (Marshall, C.J.). . . . A court must exercise this power "in light of the large objectives of the Act," *Hecht Co. v. Bowles*, 321 U.S. 321, 331, (1944). That the court's discretion is equitable in nature, *see Curtis v. Loether*, 415 U.S. 189, 197 (1974), hardly means that is is unfettered by meaningful standards or shielded from thorough appellate review. . . . It is true that "[e]quity eschews mechanical rules . . . [and] depends on flexibility." *Holmber v. Armbrecht*, 327 U.S. 392, 396 (1946). But when Congress invokes the Chancellor's conscience to furnish transcedent legislative purposes, what is required is the principled application of standards consistent with those purposes and not "equity [which] varies like the Chancellor's foot." Important national goals would be frustrated by a regime of discretion that "produce[d] different results for breaches of duty in situations that cannot be differentiated in policy." *Moragne v. States Marine Lines*, 398 U.S. 75, 405 (1970).

Similarly, in *United States v. Rodgers*, 461 U.S. 677, 708-09 (1983), the Court found that the federal codifica-

tion of forced judicial sales, 26 U.S.C. § 7403 (1982), allowed "limited equitable discretion" to consider the Government's interests and the interest of innocent third parties. Congress's amendment to the language of section 7403 from "shall decree a sale" to "may decree a sale" persuaded the Court that the statute allowed limited discretion. 461 U.S. at 705-09. *See also Arizona v. California,* 373 U.S. 546, 565-66 (1963) (where Congress has provided its own method for allocating water, courts cannot substitute their own version of equitable apportionment). In *Hecht,* 321 U.S. at 330-31, the court stated that "Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action," and that discretion must be "exercised in light of the large objectives of the Act." The *Hecht* Court found that in that particular case, continuing statutory violation was unlikely and an injunction need not necessarily issue in order to assure compliance with the Act. Statutory language and congressional objective offer the greatest guidance to defining the limits of equitable discretion.

B. The Court in Romero-Barcelo Recognized and Further Defined the Limits of Equitable Discretion

The Solicitor General and the oil companies view *Romero-Barcelo* as a statement of judicial equitable authority to balance statutory *enforcement* against "competing interests." *Romero-Barcelo* contemplates a balance only of remedies: "We read the FWPCA as permitting the exercise of a court's equitable discretion . . . to order re-

lief that will achieve *compliance* with Act." 456 U.S. at 318 (emphasis in original). The issue is how to enforce the statute, not whether to do so. Further, the *Romero-Barcelo* Court recognized that the FWPCA limited the courts' discretion in formulating remedies:

> "We do not read the FWPCA as foreclosing *completely* the exercise of the court's discretion. Rather than requiring a district court to issue an injunction for any and all statutory violations, the FWPCA permits the district court to order that relief it considers necessary to secure prompt compliance with the Act."

456 U.S. at 320 (emphasis added).

The Court concluded that the FWPCA did not completely foreclose equitable discretion only after determining that injunction was not the only means of ensuring statutory compliance, that the congressional objective could be protected by other remedies, and that the district court's consideration of appropriate remedies neither ignored the statutory violation nor undercut the purpose and function of the FWPCA permit system. 456 U.S. at 314-15. Even in light of these conclusions, the Court remanded the case for further consideration of the propriety of the injunction denial. 456 U.S. at 320.

The present case involves a continuing violation of a statute that in no uncertain terms delineates the Secretary of the Interior's duties regarding evaluation of the subsistence uses of Alaska Natives. Following the guidance of *Romero-Barcelo*, determination of the limits of equitable discretion imposed by ANILCA section 810 depends on whether relief other than an injunction can ensure statutory compliance, whether congressional objectives can be

protected by other remedies, and whether other remedies will ignore or undercut the purposes and functions of ANILCA. The subject of the inquiry is ANILCA itself.

IV. ANICLA SEVERELY LIMITS EQUITABLE DISCRETION

A. ANILCA Unambiguously Requires the Secretary of the Interior to Act to Protect the Decision-making Process and the Subsistence Needs of Rural Alaskans

Section 810 of ANILCA, 16 U.S.C. § 3120, the subject of this litigation, states unequivocally the duties of the Secretary of the Interior:

> "In determining whether to withdraw, reserve, lease or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—
>
> (1) gives notice to appropriate [State and local agencies];
>
> (2) gives notice of, and holds a hearing in the vicinity of the area involved; and
>
> (3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity

> will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and, (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions."

ANILCA section 810, 16 U.S.C. § 3120(a). Subsection (a) of section 810 is entitled "Factors considered, requirements," and states that the Secretary *"shall evaluate,"* leaving no option for the Secretary to follow another procedure or fail to act (emphasis added). Similarly, the statute requires that for *any* land use that significantly restricts subsistence uses, including leases, the Secretary *shall* follow notice and hearing procedures. Subsection (b) requires that the Secretary *shall* provide notice and hearing as part of any environmental impact statement filed pursuant to 42 U.S.C. § 4332(2)(c) (NEPA), for proposed actions under section 810. Congress leaves no doubt that ANILCA, on its face, *requires* that the Secretary follow section 810 procedures *before* allowing leasing of restricted lands for non-subsistence purposes. *Cf. United States v. Rodgers,* 461 U.S. at 705-09 (where Congress substituted "may" for "shall" some judicial discretion can be inferred).

While the language of ANILCA section 810 is clear, Congress also included in Title VIII of ANILCA a Congressional Declaration of Findings, 16 U.S.C. § 3111; a Congressional Statement of Policy, 16 U.S.C. § 3112; and a statement of Preference for Subsistence Uses, 16 U.S.C. § 3114, all of which further reflect the importance of the protection of subsistence uses and Congress' intent strictly to enforce ANILCA: "It is . . . the policy of Congress that . . . utilization of the public lands in Alaska

is to cause the least adverse impact on rural residents who depend upon subsistence uses of the resources of such lands. . . ." 16 U.S.C. § 3112.

"[I]n order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act [43 U.S.C. § 1601 et seq.] and as a matter of equity, it is necessary for Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on public lands by Native and non-Native rural residents." 16 U.S.C. § 3111(4). With respect to land use decisions, Congress chose to protect and provide for continued subsistence uses through mandatory notice and hearing procedures, to be implemented before the use of any public lands for other than subsistence purposes, including leasing.

In fulfilling its policy that "utilization of public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses . . .," 16 U.S.C. § 3112, Congress created the mandatory notice and hearing requirements of section 810, requiring the Secretary to analyze and make findings before acting in a manner adverse to subsistence uses. The policy of protection and the mandatory statutory procedure for implementation of the protection form a unit for preservation of subsistence uses.

Determination of appropriate non-subsistence uses of public lands depends entirely on the procedures of section 810. Congress created no other mechanism for consideration of reduction or elimination of subsistence uses. The

procedural mechanism embodies the substantive right. Congress manifested its interest in and concern for subsistence uses and implemented one mandatory system to allow consideration of competing uses. Only through enforcement of the statutory requirements as created can the policy and purpose of ANILCA be properly enforced. The language of the statute creates a legal duty to act in a prescribed manner, without alternative.

B. The Legislative History of ANILCA Further Supports A Strict Reading of the Statute Limiting Remedies for Violation

Representative Udall was the primary author and sponsor of the subsistence provisions of ANILCA. The following statements of Representative Udall make it clear that Congress had every intention of protecting subsistence uses through the requirements of ANILCA:

> "[W]e promised that we would work to try to achieve legislation which would include a subsistence management process to insure meaningful participation by rural people in decisions of both the State and Federal governments which so effect their culture and their lives, and which would provide a mechanism to insure that both State and Federal governments discharge their responsibilities to protect subsistence resources and uses in an adequate and timely fashion."

125 Cong. Rec. 9904 (1979). The comments reflect ANILCA's substantive nature and goals:

> "[R]ural residents and especially Native people expressed concern that their use of fish, wildlife and other wild renewable resources for subsistence must be protected and permitted to continue. . . . It was in response to these concerns [that Title VIII of ANILCA was written]."

Id. Congress recognized high stakes in enacting the subsistence review procedures: "[Subsistence] is a way of life, a unique and endangered way of life that [Title VIII] fully protects. . . ." Id. at 9901. And further:

> "If for any reason . . . the fish stocks and wildlife populations which are the subject of Alaska Native subsistence uses are significantly reduced, either as the result of the degradations of habitat [or other activities], then the Alaska Native Culture as we know it will simply cease to exist."

126 Cong. Rec. 29278. (1980). ANILCA section 810 provides the only mechanisms for subsistence protection in land use decisions such as oil leasing:

> "[Title VIII] contain[s] management provisions which recognize the responsibility of the Federal government to protect the opportunity from generation to generation for the continuation of subsistence use . . . ."

Id.

Congress expressed an awareness of a grave threat to subsistence culture and believed that ANILCA protected rural Alaskans' needs. ANILCA is self-contained; Congress declared its intent to protect subsistence needs exactly in the manner prescribed by ANILCA.

V. BECAUSE ANILCA MANDATES SPECIFIC PROCEDURES, THE SEPARATION OF POWERS DOCTRINE LIMITS EQUITABLE DISCRETION

Once Congress has legislated specific remedies for statutory violations, it, in essence, preempts judicial discretion under the separation of powers doctrine:

> "Our system of government is, after all, a tripartite one, with each Branch having certain defined func-

> tions delegated to it by the Constitution. While '[i]t is emphatically the province and duty of the judicial department to say what the law is,' *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803), it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies, mandate programs and projects, but to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them. . . ."

TVA v. Hill, 437 U.S. at 194. This is the case even where the result is "absurd." *Id.* at 196 (Powell dissenting); *see Wilderness Society v. Morton,* 479 F.2d 842 (D.C. Cir.), *cert. denied,* 411 U.S. 917 (1973) ("it is an abiding function of the courts . . . to require the Executive to abide by the limitations prescribed by the Legislature"); *see also Osborn v. Bank of United States,* 22 U.S. (9 Wheat.) at 866.

Congress has spoken with respect to subsistence uses: The protection of Alaska rural residents' way-of-life depends on federal action. ANILCA requires procedural integrity. Non-injunctive relief cannot protect the subsistence review process. Section 810 requires that a lease of land affecting subsistences uses be subject to section 810 procedures. The statute creates no option for non-compliance or partial compliance.

VI. CONGRESSIONAL PURPOSE AND THE INTEGRITY OF THE SUBSISTENCE USE ANALYSIS AND HEARING PROCESS UNDER ANILCA CAN BE PROTECTED ONLY BY INJUNCTIVE RELIEF, EXCEPT IN UNUSUAL CIRCUMSTANCES

ANILCA section 810 is designed to influence and control the land use decision-making process from a very

early stage. It is a procedural device with substantative purposes. *See* 16 U.S.C. section 3120(d). As long as the Secretary complies with the statute, public lands under his control can be used as the Secretary sees fit. *Id.* But the statute operates properly—according to Congressional design—if, and only if, the Secretary "compl[ies] with the procedural requirements." 16 U.S.C. § 312(d). Failure of the Secretary to comply with the procedural requirements skews the decision-making process and defeats Congress's policy to evaluate and determine whether a project will "cause the least adverse impact on rural residents who depend upon subsistence uses." 16 U.S.C. § 3112(1). Failure to comply with ANILCA section 810 also defeats Congress's intent to "provide a mechanism to insure . . . protect[ion of] subsistence resources and uses in an adequate and timely fashion." 125 Cong. Rec. 9904 (1979) (comments of Rep. Udall).

Obviously, if the Secretary implements a project affecting subsistence uses without following ANILCA procedures, part of the harm intended to be prevented is suffered and the integrity of the decision-making process destroyed. *See, e.g., Massachusetts v. Watt,* 716 F.2d 946, 952 (1st Cir. 1983) (harm under NEPA occurs when informed environmental consideration is bypassed). Further, the specific function of ANILCA section 810—the protection of subsistence uses—is jeopardized because the decision-maker cannot make informed findings and, ultimately, an informed decision. The Secretary has not heard from the people most knowledgable about subsistence uses. Thus, the statute, the mechanism, the decision-making process, and potentially subsistence uses themselves have been compromised.

In light of the foregoing, the court must form a remedy for the Secretary's failure. The potential harm is catastrophic. 126 Cong. Rec. 29278 (1980) (comments of Rep. Udall) (if subsistence uses are not protected, "Alaska Native Culture as we know it will simply cease to exist"). In light of the presumptions in favor of subsistence uses, and Congress's expressed concern, it is difficult to imagine a situation in which any hardship could outweigh the need to enforce the mechanism protecting subsistence uses. In very unusual circumstances, the delay caused by evaluation of the effect on subsistence uses of some federal action could adversely affect subsistence uses. *Cf. Alpine Lakes Protection Society v. Schlapfer,* 518 F.2d 1089 (9th Cir. 1975) (delay for EIS under NEPA could cause insect infestation and forest loss).

If the court allows a project to continue without the proper subsistence use evaluation, the decision-making process is compromised and the threat to subsistence use becomes, potentially, much more immediate. The further along a project progresses, the greater the stake, both financially and institutionally. *See Massachusetts v. Watt,* 716 F.2d at 953.

The injunction is an extension of congressional intent in the section 810 situation. Nothing else will ensure statutory compliance. Unlike the situation in *Romero-Barcelo,* 456 U.S. at 314, where the Navy could obtain a permit under the FWPCA without distorting the decision-making process, here failure to follow ANILCA procedures precludes future compliance with the mechanism of section 810. Con-

gress has spoken emphatically in favor of subsistence uses and, in doing so, has severely limited remedial relief.[2]

VII. THE NINTH CIRCUIT STANDARD APPLIED IN THIS CASE REFLECTS CONGRESSIONAL LIMITS ON EQUITABLE RELIEF WHILE ALLOWING A SIGNIFICANT AND STATUTORILY APPROPRIATE LEVEL OF DISCRETION

In *People of the Village of Gambell v. Hodel*, 774 F.2d 1414 (9th Cir. 1985), the Ninth Circuit first affirmed the district court's finding that the Villagers showed a strong likelihood of success on the merits. *Id.* at 1422. The court then balanced the irreparable harms in determining the propriety of injunctive relief to maintain the status quo in light of the probable statutory violation. *Id.* at 1422-26. In doing so, the court applied a presumption to the equation which placed the burden on the probable statute-violator to show the inappropriateness of an injunction. *Id.* at 1422-23. The Secretary in *Gambell* failed to meet his burden and the Ninth Circuit issued the injunction. *Id.* at 1426.

The burden applied in *Gambell* is a heavy one: the probable statute-violator must show rare or unusual circumstances to convince the court that the statutory viola-

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2 The Solicitor General agrues that compliance with ANILCA could occur at the later "development and production" stage without prejudice because the "lease" stage is not a threat to subsistence uses. Federal Petitioner's Brief at 14. Congress, however, determined that a lease of land requires that the ANILCA section 810 procedure be followed. 16 U.S.C. § 3120. Only if the Secretary considers subsistence prior to leasing can he properly consider "the availability of other lands for the purposes sought to be achieved" with subsistence uses in mind —as required by section 810. Congress has specified use of the procedure at the time of the lease. The Secretary has no option to do the procedure at some other time.

tion should be allowed to continue unremedied and that an injunction should not issue. The burden applied by the Ninth Circuit appropriately accounts for the emphatic congressional policy of protecting subsistence uses and the operation of the sole—and exclusive—statutory method for determining priorities where an action affects subsistence uses. At the same time, the Ninth Circuit rule does not foreclose discretion in the rare or unusual case in which congressional purpose and intent would be defeated by the grant of an injunction.

First, the Ninth Circuit standard applied in *Gambell* is not a "per se rule"—it does not *require* that an injunction automatically issue upon a showing of statutory violation or probable statutory violation. In three published NEPA cases, the Ninth Circuit has applied the same injunction standard applied in *Gambell* under ANILCA and determined that, on balance, the unusual circumstances outweigh the presumption in favor of injunctive relief.

In *American Motorcyclist v. Watt*, 714 F.2d 926, 966 (9th Cir. 1983), the court determined that "public concerns other than the failure to comply with NEPA must be weighed in determining whether to grant an injunction." The court in *American Motorcyclist*, citing *Romero-Barcelo*, denied the injunction for fear of resultant permanent damage to fragile desert resources after determining that the district court properly engaged in the "required weighing" and consideration of the public interest. *Id.* at 966-67. Similarly, in *Alpine Lakes Protection Society v. Schlapfer*, 518 F.2d 1089, 1090 (9th Cir. 1975), the Ninth Circuit denied a NEPA injunction because it would lead to timber damage and insect infestation, a harm which the court found outweighed the possible reduction of the area's wilderness characteristics. In *Forelaws on Board v. Johnson*, 743 F.2d

677, 688 (9th Cir. 1984), the court denied an injunction as inappropriate in light of disruption of long-term contracts entered into pursuant to another federal act that mandated their implementation with "a certain amount of urgency." *See also Steamboaters v. FERC,* 777 F.2d 1384, 1385-86 (9th Cir. 1985) (presumption of harm from NEPA violatoon outweighed "public interest in promoting small hydropower projects"); *Save Our Ecosystems v. Clark,* 747 F.2d 1240, 1250 (9th Cir. 1984) (presumption outweighed defendant's showing). Obviously, the Ninth Circuit standard applied in the *Gambell* case to a violation of ANILCA section 810 is not a "per se" injunction rule.

The Ninth Circuit standard allows the statute violator or probable violator to overcome the injunction presumption. Appropriately, the burden on the violator is high. The burden reflects ANILCA's protection of subsistence uses and Congress's choice of the decision-making process while allowing the courts to exercise their historical equitable discretion to achieve compliance with the purposes of the Act as well as the letter of the statute. *E.g., Romero-Barcelo,* 456 U.S. at 314.

Applying the Ninth Circuit standard to factual situations in *Hecht* and *Romero-Barcelo* would allow the court to reach the appropriate results. In *Hecht,* 321 U.S. at 326, the Court determined that an injunction would not further compliance. *See* Plater, Statutory Violations and Equitable Discretion, 70 Cal.L.Rev. 524, 546-53 (1982). *Hecht* involved a remedy only for past violations. Such a situation, particularly one involving a violation of ANILCA or NEPA, *see* discussion in section VI supra, would undoubtedly rise to the level of unusual circumstances. It is difficult to imagine an ANILCA section 810 violation that had only retrospec-

tive effect, but in the face of such a situation, the Ninth Circuit's standard certainly would account for it in its balance.

In *Romero-Barcelo,* the Court, reviewing the navy's release of ordnance from aircraft into navigable waters as the basis for an injunction under the FWPCA, 33 U.S.C. §§ 1251-1376 (1982), pointed to the district court's determination that (1) the Navy's control of the release area probably constituted a positive factor in the area's ecology, and (2) because of the Navy's important training functions, injunctive relief would cause grievous harms to the welfare of the Navy and the nation. 456 U.S. at 310 & n. 4. The Court also determined that the Navy's action "neither ignored the statutory violation nor undercut the purpose and function of the permit system." *Id.* at 315. The Ninth Circuit's formulation envisions consideration of exactly such factors. *See Forelaws on Board,* 743 F.2d at 966, *Alpine Lakes Protection Society,* 518 F.2d at 1090; *see also Steamboater v. FERC,* 777 F.2d at 1385-86. Similar findings under ANILCA are very unlikely, but, again, would present unusual circumstances for balance under the Ninth Circuit standard.

Congress severely limited judicial equitable discretion by enacting the strict requirements of ANILCA section 810 and instituted protection of the subsistence needs and uses of rural Alaskans through a well-defined mechanism. The Ninth Circuit standard applied in *Gambell* is sensitive both to the congressional mandate and legislated presumption and to the possibility of unusual circumstances which require discretion and nuance in formulating remedies to achieve compliance in an equitable manner. As such, the Ninth Circuit standard applied in *Gambell* consistently fol-

lows the teachings of *Romero-Barcelo, TVA v. Hill,* and *Hecht.*

VIII. CONSIDERATION OF THE APPROPRIATE INJUNCTION STANDARD IN NEPA CASES IS IRRELEVANT TO THIS LITIGATION

The Solicitor General and the oil companies attack the Ninth Circuit's use of its injunction standard in "environmental" cases. ANILCA section 810, not "environmental statutes," is the subject of this litigation. Because Congress through its legislative process determines the extent of judicial equitable discretion, see e.g., *Hecht,* 321 U.S. at 331, only ANILCA gives guidance with respect to the appropriate standard under which injunctive relief should be granted. The standard applicable for violations of other environmental statutes cases depends on the wording of those statutes and a full review of the statute's legislative history—an inquiry inappropriate in this ANILCA section 810 case.

The Solicitor General's brief best illustrates the need for a statute-specific inquiry. While the Solicitor frames the question on certiorari as whether an injunction should issue for a likely violation of "an environmental statute," he is forced repeatedly to return to the text of ANILCA to argue the propriety of the injunction in this case. *E.g.* Federal Petitioners Brief at 21-22, 22, 23, 24, 25. The Solicitor's analysis of ANILCA gives no guidance for injunctive issuance standards under other statutes, other than to underline the need to review each statute separately.

Only ANILCA is relevant to the specific consideration of hardship factors in this case. The Ninth Circuit properly applied a presumption in favor of injunctive relief

for an ANILCA section 810 violation that reflects congressional intent while allowing sufficient discretion to deal appropriately with unforseeable cases.

Congress requires that Alaskan rural residents receive the opportunity to enter the decision-making process from the beginning. Congress determined the sole process by which Alaska rural residents' interests can be heard and considered. When the Secretary fails to follow the mandated procedures, decision-making is distorted and the natives' interests lose protection. The Secretary can decide appropriate land uses only according to the legal mechanism. Injunctive relief protects the intergrity of the process.

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IX. CONCLUSION

For the foregoing reasons, amici submit that the decision of the Ninth Circuit should be affirmed.

Dated: September 30, 1986

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In the Supreme Court of the United States

OCTOBER TERM, 1986

DONALD P. HODEL, SECRETARY OF THE INTERIOR; and THE UNITED STATES DEPARTMENT OF THE INTERIOR, and AMOCO PRODUCTION COMPANY, et al.,

Petitioners,

vs.

PEOPLE OF THE VILLAGE OF GAMBELL, et al.,

Respondents.

AMICUS BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, ENVIRONMENTAL DEFENSE FUND, NATIONAL AUDUBON SOCIETY, WILDERNESS SOCIETY, ENVIRONMENTAL POLICY INSTITUTE, TRUSTEES FOR ALASKA, NORTHWEST COALITION FOR ALTERNATIVES TO PESTICIDES, and OREGON NATURAL RESOURCES COUNCIL

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ISSUE PRESENTED

Did the Court of Appeals err by ordering that the Department of Interior be enjoined from proceeding with a lease sale in violation of a nondiscretionary duty imposed by Congress in section 810(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120(a)?

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STATEMENT OF INTEREST OF AMICI CURIAE*

Amici Curiae are non-profit, public interest organizations whose purpose in part is to monitor the activities of federal agencies for compliance with environmental laws. Amici regularly seek redress in federal courts for agency violations of these laws. Injunctive relief is the principal remedy sought in such cases, and Amici are therefore vitally interested in this Court's rules of decision for granting or denying injunctive relief in cases involving statutory volations by federal agencies.

SUMMARY OF ARGUMENT

Petitioner Hodel in this case failed to comply with the nondiscretionary procedural obligations of section 810(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 1320(a). Under section 810(a) Hodel must evaluate the impacts of oil exploration and development on subsistence uses of public lands prior to leasing those lands. Petitioner Hodel failed to comply with this nondiscretionary duty.

This Court has long recognized Congress "may intervene and guide or control the exercise of the courts' discretion," provided Congress does so "in so many words, or by a necessary and inescapable inference. . . ." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) *quoting Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). When Congress imposes nondiscretionary duties on federal

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*All parties have consented in writing to the participation of these *amici* pursuant to Rule 36, Revised Rules of the Supreme Court. This brief is filed in support of the position of Respondents Village of Gambell, *et al.* This brief addresses only the propriety of the injunctive relief granted by the Court of Appeals in this case.

agencies Congress "by necessary inference" restricts the discretion of courts presented with violations of those duties. An agency's violation of a nondiscretionary duty constitutes irreparable injury which must be enjoined unless to do so would create a result contrary to the statute imposing the duty.

The Court of Appeals examined the language, purpose, and structure of section 810(a) of ANILCA to determine the appropriateness of injunctive relief in this case. Section 810(a) of ANILCA imposes a nondiscretionary duty upon the Secretary of the Interior to evaluate the impacts of oil exploration and development on subsistence uses of public lands prior to leasing. That duty was not fulfilled in this case. The court therefore properly remanded the case to the district court because the district court failed to account for the irreparable injury flowing from the violation of section 810(a).

The nondiscretionary duty imposed by section 810(a) of ANILCA is analogous to the duty imposed on federal agencies by section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536. In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), this Court concluded that it was compelled to enjoin violations of section 7 because injunctions were the only way to ensure compliance. In the circumstances of this case, injunctive relief is also the only method of insuring compliance with section 810(a) of ANILCA.

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982), upon which petitioners rely, supports the Court of Appeals' decision in this case. *Weinberger* recognized that courts' equitable discretion may be controlled by Congress, and that close scrutiny of the purpose and structure of applicable statutes is necessary to determine the degree to which Congress has restricted that discretion. The

Court in *Weinberger* concluded that courts may deny injunctive relief for violations of the permit requirements of the Clean Water Act, 33 U.S.C. § 1342, because (1) there are alternative ways to enforce the Act, (2) the permit process is a means to an end and the lack of a permit is not *per se* inconsistent with the Act's substantive goals, and (3) the exercise of equitable discretion was consistent with the "phased-compliance" scheme of the Act. None of these features is present in section 810(a) of ANILCA.

The constitutional doctrines of separation of powers and checks and balances also support the Court of Appeals' conclusion that an injunction is required in this case. In *Weinberger*, section 402 of the Clean Water Act regulated the federal defendant as it would have regulated a private sector polluter. In contrast section 810(a) of ANILCA is directed exclusively at federal agencies and is intended to guide and restrict their exercise of delegated power. It is the Court's role to enforce Congress' limitations on delegated power so long as those delegations are constitutional.

This Court has upheld delegations of power to agencies against separation of powers challenges in part because such delegations have been accompanied by provisions that guide the exercise of that power. It would be anomalous for the Court, having previously found that Congress is constitutionally compelled to provide guidance for the exercise of delegated power, to conclude that courts may refuse to enforce such guidance without themselves violating separation of powers principles.

If the Court fails to enjoin defendant's violation of its nondiscretionary duty under section 810(a), defendant will accrue power not delegated by Congress, and Congressional

power to check the authority of Executive branch agencies will be diluted. The Court will have neglected its own constitutional responsibility to enforce the checks placed by Congress on delegated powers, and will have facilitated the unauthorized exercise of power by a coordinate branch of the federal government.

I

THE COURT OF APPEALS' OPINION IN THIS CASE IS CONSISTENT WITH THE PURPOSES OF § 810(a) OF THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT (ANILCA)

The Court of Appeals in this case found that "[a]n injunction is the appropriate remedy for a substantive [sic] procedural violation of an environmental statute." *Village of Gambell v. Hodel*, 774 F.2d 1414, 1422 (9th Cir. 1986).[1] The court recognized that injunctive relief might not be appropriate in the unusual case where such relief would contravene the purposes of a statute, but concluded that in this case the defendant's violation of the nondiscretionary duty imposed by section 810(a) of ANILCA, must be enjoined because it violated "clearly expressed Congressional intent. . . ."[2] 774 F.2d at 1426. The court

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1. The word "substantive" should be "substantial," as it is in the opinion the court cites as the source of the rule. *See Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985).

2. When injunctive relief would create a result inconsistent with the purposes of a statute, a court's refusal to issue an injunction is consistent with its constitutional obligation to see that Congressional intent is carried out. *See e.g., American Motorcycle Association v. Watt*, 714 F.2d 962 (9th Cir. 1983) (injunction against enforcement of ordinance would allow race to proceed and cause harm to the environment); *Alpine Lakes Pro-*

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properly avoided speculation about whether compliance with section 810(a)'s procedures would have produced a particular result, and instead found that: " 'Irreparable damage is presumed when an agency fails to [follow procedures required by law].' " 774 F.2d at 1423 (*quoting Save Our ecoSystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984)). Since the district court had failed to account for the fact that an agency's violation of a nondiscretionary procedural obligation may itself cause irreparable injury to plaintiffs by undermining the decision-making process and the Constitution's distribution of federal power, the court of appeals remanded for entry of a preliminary injunction.[3]

In *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982), this Court found that Congress, through the "purpose and language" of an Act, "may intervene and guide or control the exercise of the courts' discretion. . . ." An analysis of section 810(a) of ANILCA reveals that Congress did not intend to allow any exceptions to the mandatory requirements of the section, and therefore necessarily restricted the equitable discretion of courts presented with a violation of the section.

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tection Society v. Schlapfer, 518 F.2d 1089, 1090 (9th Cir. 1975) (injunction against timber harvesting of infected trees would result in more trees being infected—a result inconsistent with environmental protection purposes of NEPA).

3. This case involves a preliminary injunction and technically no final determination on the merits has been reached. But the Court of Appeals' decision on the likelihood of success is unequivocal; the defendant has violated the statute as interpreted by the Court of Appeals. Petitioner Hodel candidly admits that the Court of Appeals' decision in this case is final (brief of Hodel at 25 n.14) and in fact has been given precedential effect in *Tribal Village of Akutan v. Hodel*, 788 F.2d 1567 (9th Cir. 1986). For purposes of determining appropriate relief, therefore, the case should be viewed as having been decided on the merits.

A. Section 810(a) Imposes A Nondiscretionary Duty Analogous To That Imposed By Section 7 Of The Endangered Species Act

In concluding that an injunction was necessary based on the facts in the instant case, the court of appeals properly examined the purposes and structure of section 310(a) of ANILCA. Section 810(a) imposes a nondiscretionary duty upon the Secretary of the Interior to evaluate the impacts of oil exploration and development on subsistence uses of the public lands prior to leasing. It provides in relevant part:

> In determining whether to . . . lease . . . public lands under any provision of law authorizing such actions,[4] the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes.

If the relevant agency finds that a proposed lease may affect subsistence uses, the agency cannot proceed until the head of the agency:

> (1) gives notice to the appropriate State agency and the appropriate local committee and regional councils established pursuant to section 3115 of this title;
>
> (2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

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4. The Secretary's authority to conduct the lease sales at issue in the instant case was delegated by Congress in the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356.

> (3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

16 U.S.C. § 1320(a).

The purpose of section 810(a) is to guide the exercise of previously delegated power. Congress intended in section 810(a) to insure that agencies fully consider subsistence needs prior to leasing decisions. The nondiscretionary duty imposed by section 810(a) is analogous to the nondiscretionary duty imposed on federal agencies by section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536, and addressed in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). Here, as with section 7 of the ESA, section 810(a) of ANILCA imposes an absolute duty: to evaluate impacts on subsistence uses, and to provide notice, hearings, and findings if significant impacts may occur. As this Court noted in *Weinberger*, the ESA "contains a flat ban on the destruction of critical habitats." 456 U.S. at 314. Once it was determined that completion of the Tellico dam would destroy critical habitat, the Court had no difficulty in concluding that "only an injunction would fulfill the objectives of the Act." *Id.* *See also Japan Whaling Assoc. v. American Cetacean Society*, 54 U.S.L.W. 4929, 4932 (June, 1986) ("The Secretary, of course, may not act contrary to the will of Congress when exercised within the bounds of the Constitution. If Congress has directly spoken to the precise issue in

question, if the intent of Congress is clear, that is the end of the matter."). The inference of Congressional intent to guide the exercise of judicial discretion is as necessary here as it was in *TVA v. Hill*. The court of appeals found that the appropriate way to vindicate the objectives of section 810(a) in this case is to enjoin the agency from proceeding until it has completed its section 810(a) analysis.

B. The Procedural Nature Of The Harm In This Case Supports The Imposition Of An Injunction

Hodel attempts to distinguish *TVA v. Hill* by arguing that "[b]y its very nature, a procedural requirement is ancillary to the substantive policy objectives of the statutes and . . . injunctive relief should [therefore] normally turn on the particular circumstances of the case." Brief of Hodel at 22. Hodel thus asks that courts be allowed to predict whether the procedural requirements that Congress imposed absolutely will in fact further the "substantive goals" of a statute in particular cases. Even if such predictions could be made, however, courts must respect Congress' choice of procedures. Procedures carry intrinsic value, and the constitutional implications of judicial second-guessing of those values are significant.[5] As the First Circuit stated with regard to another procedural statute:

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5. "When Congress has prohibited certain conduct, law-abiding citizens presumably refrain from that conduct voluntarily. The defendant in an injunction proceeding who asks the court to balance the remedies in [its] favor is, in effect, asking the court to approve of [its] decision not to comply with the duties that law-abiding citizens comply with voluntarily. Thus, the court is being asked to voice its approval of lawless conduct." Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 16 Land Use and Environment L. Rev. 317, 339-40

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> NEPA is not designed to prevent all possible harm to the environment; it foresees that decisionmakers may choose to inflict such harm, for perfectly good reasons. Rather, NEPA is designed to influence the decisionmaking process; its aim is to make governmental officials notice environmental considerations and take them into account. Thus, when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered. NEPA in this sense differs from substantive environmental statutes, such as the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq. The Federal Water Pollution Control Act focuses upon the "integrity of the Nation's Waters, not the permit process," *Weinberger v. Romero-Barcelo,* 456 U.S. at 314. NEPA does the converse. Moreover, to set aside the agency's action at a later date will not necessarily undo harm. The agency as well as private parties may well have become committed to the previously chosen course of action, and new information—a new EIS—may bring about a new decision, but it is that much less likely to bring about a different one. It is far easier to influence an initial choice than to change a mind already made up.

Massachusetts v. Watt, 716 F.2d 946, 952 (1st Cir. 1983).

Hodel suggests that because the Senate report on ANILCA states that a proposed action may proceed after

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(1985). It is particularly inappropriate to approve of the lawless conduct when the violator is a federal agency. *See e.g.,* Executive Order No. 11514 (federal agencies are to "provide leadership in protecting and enhancing the quality of the Nation's environment . . .").

a section 810 evaluation, even though its effects are adverse to subsistence uses, Congress could not have intended that section 810(a)'s procedures always precede decision-making. Brief of Hodel at 23, n.13. But the fact that Congress chose not to dictate substantive results does not suggest that Congress would acquiesce in *post hoc*, formalistic procedural compliance. Quite the opposite. To the extent Congress has relinquished control over substantive outcomes, the need for strict compliance with the procedural safeguards accompanying the delegation of power is heightened. *See* part II of this brief, *infra*.

C. Section 810(a) Of ANILCA Is Not Analogous To Section 402 Of The Clean Water Act

In *Weinberger v. Romero-Barcelo*, this Court concluded that federal courts are not compelled to issue injunctions against federal agencies who violate the permit requirements of section 402 of the Clean Water Act, 33 U.S.C. § 1342. 456 U.S. at 320. In concluding that Congress had not intended in section 402 to limit the equitable discretion of courts, the Court stressed three factors—none of those three factors is present in the instant case.

First, the Court found that injunctions were not the only method of enforcing the permit requirements of section 402. 456 U.S. at 314. In addition to providing for injunctive relief, the Act provided for fines and penalties to be imposed as a means of achieving the goals of the Act. *Id.* In contrast, ANILCA provides no system of fines or penalties to impose upon federal agencies who violate the nondiscretionary duty imposed by section 810(a).[6] Injunctive relief is the only means of ensuring compliance.

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6. The Clean Water Act's federal facilities provisions, 33 U.S.C. § 1323, subject federal agencies to the same regulatory

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Second, the Court found that the purpose of the Clean Water Act was to insure clean water for the nation, and the permit process was simply a means of achieving that goal. 456 U.S. at 314. Since the particular discharge at issue apparently did not pollute the water (456 U.S. at 315), and since the lower court had ordered the federal defendant to obtain a permit (*id.*), the Court found that the lower court's denial of injunctive relief was not contrary to the purposes of the Act.

In the instant case the purpose of section 810(a) of ANILCA is to require the Secretary, in exercising delegated powers, to evaluate the impacts of oil exploration and development on subsistence uses of the public lands and provide notices, hearings, and findings *prior to* allowing leasing to occur. The Secretary cannot comply with section 810(a) once a lease has been completed. The legislative history of section 810(a) confirms its plain language. Congress intended that "until the requirements of . . . section [810] have been satisfied the proposed action *may not* proceed." S. Rep. 96-413, at 234 (emphasis added). Pre-decision consideration is the *raison d'etre* of section 810(a), and allowing *post hoc* compliance, or no compliance, is unquestionably contrary to the purposes of section 810.

Finally, this Court in *Weinberger* found that Congress did not envision that all pollution would be halted immediately, but rather envisioned a period of "phased compliance," in which the economic and environmental impacts of reducing pollution could be weighed on a case-by-case

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requirements as private citizens, essentially treating agencies as citizens when they pollute water. In contrast, section 810(a) is directed at agencies *qua* agencies, and reflects Congress' determination to control how those agencies exercise delegated powers.

basis. 456 U.S. at 316-17. The exercise of judicial equitable discretion was consistent with the phased compliance scheme of the Clean Water Act. No equivalent phased compliance scheme exists under ANILCA. Section 810(a) makes clear that compliance must occur prior to making any decision to lease.

Amoco argues that a number of lower court opinions apply *Weinberger* "broadly," and urges this Court to follow suit. Brief of Amoco at 44-45. But a close examination of the opinions cited by Amoco reveals that, while those courts cited *Weinberger* for the proposition that courts retain broad discretion to excuse statutory violations, they have *applied* that discretion to withhold injunctive relief only in cases where agency compliance was likely to occur in the absence of an injunction.[7]

II

REFUSING TO ENFORCE A NONDISCRETIONARY DUTY IS CONTRARY TO THE DOCTRINES OF SEPARATION OF POWERS AND CHECKS AND BALANCES

There are significant constitutional aspects to the injury created by agency violations of nondiscretionary procedural obligations. When Congress imposes on Executive branch agencies a nondiscretionary duty to follow specified procedures while exercising delegated powers,

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7. *See e.g., Alaska v. Andrus*, 580 F.2d 465, 486 (D.C. Cir.) *vacated in part on other grounds sub nom.; Western Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978) (injunction not necessary to preserve opportunity to choose among alternatives). *See generally* Z. Plater, *Statutory Violations and Equitable Discretion*, 70 Cal. L. Rev. 524 (1982) (reviewing cases in which courts have declined to issue injunctions against statutory violations because compliance would occur without the injunction).

courts have a constitutional obligation to enforce such duties. Agency violations of nondiscretionary duties involve clear derelictions of the Executive branch's obligations to execute the laws of Congress. In enforcing such duties the Court must be sensitive to its constitutional role, as well as the constitutional roles of the Executive and Legislative branches. The Court exceeds the bounds of its judicial role if it second-guesses the propriety of applying Congressional controls on delegated agency powers. This Court has concluded that broad delegations of power to Executive branch agencies are constitutional only *if* they contain appropriate standards or controls for the exercise of such power.[8] For courts to decline to enforce such controls raises the very constitutional concerns the Court has expressed about the initial delegations. When a federal agency is the defendant in a case involving violations of a nondiscretionary duty, a refusal to enjoin the violation is an abdication of the Court's role in the constitutional system of checks and balances and allows irreparable injury to the Constitution's allocation of federal power.

A. Federal Courts Must Enforce Procedural Safeguards Imposed By Congress To Maintain The Separation Of Powers

This Court has recently emphasized the importance of Congressional control over the exercise of delegated powers in maintaining the separation of powers envi-

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8. *See e.g., American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 543 (Rehnquist, J., dissenting); *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980) (stressing the importance of adequate controls on the exercise of delegated powers); *Yakus v. United States*, 321 U.S. 414 (1944) (delegated price control authority constitutional because accompanied by sufficiently clear standards established by Congress).

sioned by the Constitution. *See Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 646 (1980) ("sweeping delegation[s] of legislative power" violate separation of powers principles). When Congress imposes nondiscretionary procedural duties, judicial enforcement of controls on delegated power is particularly important. Congress in such statutes expresses its deepest concern for the proper exercise of delegated powers, and includes the word "shall" rather than "may" because it means to brook no exceptions. *See e.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1970) (agency did not have discretion to ignore Congressional direction that agencies "shall" not approve any program affecting parklands unless specific criteria are present—Court enjoined action pending compliance with procedures). Nondiscretionary language is important because it plainly marks the division between legislative and executive power. If courts erase that line by refusing to enforce nondiscretionary duties, they contribute to an irreparable injury with constitutional implications—an erosion of the basic principle of separation of federal powers.

B. The Constitution's System Of Checks And Balances Requires The Judiciary To Insure Executive Compliance With Legislative Directives

Judicial decisions not to enforce agency nondiscretionary duties imposed by Congress also violate the constitutional principle of checks and balances. When courts elect not to enjoin statutory violations of *regulatory* statutes (which are essentially the same whether the regulated entity is a federal facility or a private party), that raises concerns about the separation of powers and whether the *court* is fulfilling its law-enforcing role. When courts are presented with agency violations of nondiscretionary

duties, that triggers the Court's additional obligation to check the unauthorized exercise of power by a coordinate branch of the federal government. The drafters of the Constitution determined that: "[The] three branches [of the federal government] should be rendered interdependent by giving each other a 'partial agency, or control,' over the other branches, securing in that way an equilibrium of governmental powers. This achieved a novel mixture of the doctrine of separation of powers with the doctrine of checks and balances." Panagopoulos, *Essays on the History and Meaning of Checks and Balances*, 174-75 (Univ. Press of America 1985). An important aspect of the Court's role in checking the power of its sister branches is its review of Executive branch actions to insure that they comply with constitutionally imposed legislative commands. "The courts have . . . traditionally exercised a reviewing function to ensure executive compliance with applicable public law, policing executive officers' obedience to legislative commands and providing a further set of internal checks on governmental power used against the citizenry." Breyer and Stewart, *Administrative Law and Regulatory Policy* 42 (Little, Brown, and Co. 1985). When agencies refuse to comply with nondiscretionary obligations imposed by Congress, courts are the only practical forum for remedying such violations. If the courts do not restrain such abuses, they will go unchecked.

While the tension between the courts' traditional balancing of equities and their role in the constitutional system of checks and balances may (as in *Weinberger, supra*) be resolved in favor of the courts' equity power when the exercise of judicial discretion is consistent with a statutory scheme, the courts' role as a check on Executive power must predominate when the courts are faced with a viola-

tion by an Executive branch agency of a nondiscretionary duty imposed by Congress and intended to guide the exercise of delegated power.

III

PETITIONERS HAVE NOT DEMONSTRATED THAT THE COURT OF APPEALS ABUSED ITS DISCRETION BY REQUIRING AN INJUNCTION IN THIS CASE

A. Petitioners Have Not Accurately Analyzed The Language And Purpose Of Section 810(a)

Petitioners argue that the court of appeals' opinion in this case is contrary to this Court's opinion in *Weinberger*. Brief of Hodel at 17; brief of Amoco at 44-46. Petitioner Amoco, however, misapplies *Weinberger* by simply iterating the general rule that Congressional intent to restrict equitable discretion will not lightly be implied. Amoco does not, as *Weinberger* requires, analyze section 810(a) to determine whether the specific language and purpose of that provision limits the courts' equitable discretion.

Petitioner Hodel argues that there is no "clear indication" that Congress intended through section 810 to limit the traditional equitable discretion of the courts, because the language of section 810 "does not address the distinct issue whether a district court must award certain relief. . . ." Brief of Hodel at 22. But Congress need not directly address the issue of judicial discretion in order to limit the courts' exercise of equitable powers. As this Court found in *TVA v. Hill, supra,* the nondiscretionary language of an Act may limit the courts' discretion, even though the statute does not expressly address the issue of equitable discretion. The Court drew the "necessary inference" from the language and purpose of the ESA that

Congress intended to limit the courts' equitable discretion. 437 U.S. at 194. The same inference is compelled by the nondiscretionary language of section 810; Congress did not intend to brook exceptions—administrative *or* judicial.

B. Section 810(a) Compliance May Not Occur Subsequent To Leasing

Hodel argues that an injunction is not necessary in this case because, according to Hodel, compliance with the procedural requirements of section 810 may occur subsequent to leasing but prior to development and production.[9] Brief of Hodel at 24. There are three problems with Hodel's argument.

First, it ignores the plain language of § 810, which requires that evaluation of impacts on subsistence uses take place "[i]*n* determining whether to . . . lease. . . ." 16 U.S.C. § 3120(a) (emphasis added). This language anticipates by its terms that evaluation will precede leasing. Furthermore, the Secretary must determine the size

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9. Petitioners also imply (but do not assert) that there is a statutory conflict between the procedures required by section 810(a) and the provisions of OCSLA governing oil and gas leasing. No such conflict exists. OCSLA is not a single purpose statute; it contains numerous requirements intended to protect the environment. *See, e.g.*, 43 U.S.C. § 1346. If a potential conflict existed, any ambiguities in statutory language would have to be resolved in favor of a construction that accommodates both statutes. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) ("where two statutes are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective,'" quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Additionally, ANILCA was adopted subsequent to OCSLA, and Congress must be presumed to have been aware of OCSLA's provisions and to have interpreted those provisions as compatible with section 810(a) of ANILCA. *See Director v. Perini North River Associates*, 459 U.S. 297, 319 (1983) (when interpreting statutes, courts "may presume 'that our elected representatives, like other citizens, know the law,'" quoting *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979)).

of an area to be leased prior to leasing. 43 U.S.C. § 1344(a). Section 810(a)(3)(B) of ANILCA requires that if leasing will restrict subsistence uses, the Secretary must insure that "the proposed [leasing] will involve the minimal amount of public lands necessary to accomplish the purposes of such [leasing]. . ." It would be impossible for the Secretary to reduce the size of lease sale areas in order to minimize impacts on subsistence uses if the evaluation of impacts occurs only after the lease sale has been held.

Second, post-lease consideration cannot fully account for subsistence uses unless the Secretary has the authority to withdraw leased tracts from production if he finds subsistence uses will be affected. The only bases for withdrawing or canceling a lease under the OCSLA, however, are: 1) if the lessee fails to comply with the OCS Lands Act, as amended, or any provisions of the lease or regulations issued under the Act (43 U.S.C. § 1334(c) and (d)); or, 2) if activity on the lease a) would probably cause serious harm or damage to life, property, any mineral, to the national security or defense, or to the marine or coastal environment, b) the harm will not disappear or decrease to an acceptable extent within a reasonable period of time and c) the advantages of lease cancellation outweigh the advantages of continuing such lease (43 U.S.C. § 1334(a)(2)(A)). Subsistence impacts are not one of the stated grounds for lease cancellation.[10] Even if the Sec-

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10. Impacts on subsistence uses may or may not translate into damage to the environment. It is conceivable that, by making certain tracts available for production and not others in an attempt to minimize impacts on subsistence uses, the Secretary will cause *adverse* environmental impacts. (For example, allowing production close to shore or near some non-subsistence resource or critical habitat.) The Secretary is not statutorily authorized to minimize these subsistence impacts *post*-leasing. Such impacts may only be minimized *prior to* leasing.

retary could cancel a lease to protect subsistence uses, the Secretary would have to pay millions of dollars for each withdrawn tract. Lessees are entitled to compensation for lease cancellation under 43 U.S.C. § 1334(a)(2)(C). To buy back just one Alaskan OCS tract after it has been leased and explored could cost the government over $50 million: the bonus bid paid by the oil company (which for some Alaskan tracts exceeds $30 million), plus the lessee's cost of exploring that tract, which could amount to $15 to $20 million, plus interest. The Secretary's reluctance to protect subsistence uses will increase as the cost of such protection increases. Lease cancellation was intended as a last resort for reversing bad leasing decisions if impacts which were unforeseeable at the time of the lease sale subsequently became known. Lease cancellation was not intended to replace the need for a comprehensive assessment prior to making the initial decision to lease.[11]

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11. This conclusion is fully consistent with this Court's decision in *Secretary of the Interior v. California*, 464 U.S. 312 (1984). That case held that nothing that occurs at the lease sale stage "directly affects" the coastal zone so as to require a determination of consistency under the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451, *et seq.* Two points distinguish *California* from this case. First, as the Court in *California* repeatedly emphasized, the CZMA itself provides states with power to veto leases at the exploration and production stages of offshore development as well as at the lease sale stage. ("The State can veto the [development and production] plan as 'inconsistent' [with its coastal management program]. . . . 43 U.S.C. § 1351(d) (1976 ed., Supp. III)." 464 U.S. at 340.) No corresponding post-lease cancellation authority exists under ANILCA. Second the Court's opinion in *Secretary v. California* rested in large part on "the lengthy, detailed and coordinated provisions of CZMA § 307(c)(3)(B), and OCSLA §§ 1344-1346 and 1351 . . ." 464 U.S. at 343. That detailed statutory coordination was a principal reason for the Court's conclusion that Congress intended to postpone consistency review to the later stages of OCS activities. There is no detailed coordination between ANILCA and OCSLA that would suggest an intent by Congress to defer ANILCA review to later stages.

Third, contrary to the federal petitioners' allegations, significant impacts on subsistence resources *can* occur during exploration, as the Ninth Circuit recognized in this case. "The by-products of oil and gas exploration such as potential oil spills, leakage, and noise pose the threat of disruption to subsistence economy sufficient to destroy irreparably the isolated and unique culture of the Native Alaskans." *Gambell II*, 774 F.2d at 1426. The dangers from exploratory activities arise from two sources: noise and oil spills. Noise attributable to airplanes, ships and other mechanized traffic could cause reductions in animal populations which form the basis of the tribe's subsistence economy. As the Final Environmental Impact Statement (FEIS) for Norton Sound indicates, such noise may reduce the populations of whales, seals, and walrus. Sale 57 FEIS at 167, 177-80, 184.

There is also a real risk that oil spills from exploratory drilling will harm subsistence uses. In Norton Sound, the industry has used conventional jack up rigs to drill exploratory wells. The Norton Sound FEIS states that faults and thermogenic gas, two hazards present in Norton Sound, pose extreme dangers for jack up rigs. FEIS at TABLE III.A.1.1. The threat of significant spills was illustrated when a drilling rig loaded with fuel nearly broke apart while it was being towed in Norton Sound during one of the sudden and violent storms that periodically sweep the Bering Sea. Anchorage Daily News, September 22, 1982, pg. 1.

Oil spills during exploration could prove devastating. For example, a large oil spill could destroy the walrus hauling areas near St. Lawrence Island in the Bering Sea off Alaska. Because the people of St. Lawrence Island depend on walrus for over 80 percent of their food, such a

spill could threaten the entire island with starvation. Little and Robbins, Technical Report No. 89 at 294, 334, 343-44.

Petitioners' argument that compliance with section 810(a) can occur subsequent to leasing and therefore no injunction is necessary is without merit.

IV

INJUNCTIVE RELIEF DOES NOT PUNISH THIRD PARTY BENEFICIARIES OF AGENCY REFUSALS TO PERFORM NONDISCRETIONARY DUTIES

Petitioner Amoco argues that injunctive relief in this case will not "deter" Interior's violation of section 810(a), but instead will simply punish or harm petitioner. Brief of Amoco at 37-38. Amoco's deterrence argument is based on the assumption that once the Secretary has made a decision, the Secretary's mind cannot be changed by directing that additional facts be considered. But of course if this assumption is adopted then injunctive relief for violation of *any* procedural obligation would be pointless. Congress assumed the opposite; that forcing agencies to consider impacts on subsistence uses, and provide notice and hearings on those impacts, may indeed change substantive decisions. Courts, including this Court, routinely order agencies to reconsider decisions and follow proper procedures in doing so. *See e.g., Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 420-21 (1970). If the mere fact that an agency has arrived at a decision is sufficient to conclude that further procedural steps would be useless, agencies would have an incentive to do that which Congress is attempting to prevent—rush to judgment with no concern for proper procedure and involvement of the public. An injunction against exploration prior to

section 810(a) compliance in this case will obviously "deter" the agency's violation in this case; *not* to enjoin the violation will encourage future violations.

Amoco's argument that an injunction "punishes" Amoco is simply a restatement of the "balance of the harms" aspect of injunctive relief. To the extent Amoco is harmed one could argue that it is also "punished," but that does not further the analysis. Amoco's true complaint is that it suffers a monetary loss[12] if leasing doesn't go forward, while "[p]laintiffs suffered no tangible injury by virtue of Interior's decision to issue Sale No. 57 and 83 leases without complying with ANILCA. . . ." Brief of Amoco at 47. But Amoco's point proves too much. The difficulty in quantifying the harm flowing from an agency's refusal to follow mandatory procedures increases the likelihood that "balancing of the harms" will become judicial policymaking. A court can speculate that the harm flowing from a procedural violation is as great or as small as the court desires. In more traditional cases courts are able to balance one quantifiable harm against another. If issuing an injunction would prevent $10 worth of harm but cause $25 worth of harm, for example, courts could be expected uniformly to deny injunctive relief. *See e.g., Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. App. 1970). As the values on either side of the equation become more

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12. This Court recently recognized: "Under the plain language of OCSLA [the Outer Continental Shelf Lands Act], the purchase of a lease entails no right to proceed with full exploration, development, or production . . . the lessee acquires only a priority in submitting plans to conduct those activities. If those plans, when ultimately submitted, are disapproved, no further exploration or development is permitted." 464 U.S. 312, 339 (1983). Since Amoco's lease plainly does not create any "right," it would be anomalous to find that Amoco's investments based upon the lease are sufficiently important to outweigh the value of a federal agency complying with an explicit directive from Congress.

difficult to quantify, however, the opportunity for courts to impose their own values, and the likelihood that different courts will reach different results in similar cases, increases. Fidelity to statutory directives becomes even more important in such circumstances.

The importance of procedural compliance should not turn upon the personal opinions of the court in which relief is sought, or the particular facts of individual cases. Speculation about relative benefits and costs is a value-laden legislative act—one that courts must avoid if a statutory command applies. The district court's opinion in this case illustrates the danger: the court "balanced" two competing policies—oil exploration and subsistence uses of the public lands, and made the policy choice that "the public interest favors continued oil exploration" (Pet. App. 43a) to the exclusion of procedures required by Congress. When *Congress* has determined that specific procedures should be followed, courts should not second guess the Congressional calculus. "In our constitutional system the commitment to the separation of powers is too fundamental for [courts] to preempt congressional action by judicially decreeing what accords with 'common sense and the public weal.'" 437 U.S. at 195.

CONCLUSION

The relief ordered by the Court of Appeals in this case was appropriate and should be affirmed.

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IN THE

Supreme Court of the United States

October Term, 1986

DONALD P. HODEL,
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UNITED STATES DEPARTMENT OF THE INTERIOR,
Petitioners,

AMOCO PRODUCTION COMPANY; et al.,
Petitioners,

v.

PEOPLE OF
THE VILLAGE OF GAMBELL; et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF NORTH SLOPE BOROUGH, et al. IN SUPPORT OF RESPONDENTS PEOPLE OF THE VILLAGE OF GAMBELL, et al.

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DONALD P. HODEL, Secretary of the Interior; and UNITED STATES DEPARTMENT OF THE INTERIOR,

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Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, et al.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICI NORTH SLOPE BOROUGH, INUPIAT COMMUNITY OF THE ARCTIC SLOPE, UKPEAGVIK INUPIAT CORPORATION AND KODIAK AREA NATIVE ASSOCIATION IN SUPPORT OF RESPONDENTS PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

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INTEREST OF AMICI CURIAE

Amici are organizations which represent, in overlapping capacities, Alaska Natives who reside in the coastal regions of rural Alaska. The North Slope Borough is a political subdivision of the State of Alaska. Pursuant to Supreme Court Rule 36.4, the consent of the parties for the filing of this brief is not required. The North Slope Borough is the northernmost regional municipality in the United States, comprising 88,231 square miles adjacent to the Arctic Ocean. The great majority of the population of the Borough (84% according to 1980 U.S. Census data) are Natives and are dependent upon the sea ice regions off the Alaskan coast for their subsistence.

The Inupiat Community of the Arctic Slope (ICAS) is a regional tribal organization organized under the Indian Reorganization Act, 25 U.S.C. §§ 461 et seq.,

and represents the Native Eskimo people of an area roughly coextensive with the North Slope Borough.

Ukpeagvik Inupiat Corporation (UIC) is the Native village corporation organized under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601 et seq., for Barrow, Alaska.

Amici, in a variety of forums, have consistently stressed the necessity of protecting subsistence activities in the face of pressure for continued oil development in sea-ice areas. Amici ICAS and UIC, in a case consolidated for oral argument in the Ninth Circuit with Village of Gambell v. Clark, 746 F.2d 572 (9th

Cir. 1984) (Gambell I), claimed that the Inupiat people retain aboriginal title in sea-ice areas beyond the legal boundaries of the State of Alaska, because the extinguishment provisions of ANCSA, 43 U.S.C. § 1603, only purported to extinguish such rights "in Alaska." Inupiat Community of the Arctic Slope v. United States, 746 F.2d 570 (9th Cir. 1984). The Gambell I plaintiffs took a different approach -- they argued that "in Alaska" should be construed consistently in ANCSA and in the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3101 et seq. The Court of Appeals in Gambell I recognized that "the two statutory provisions are clearly related," 746 F.2d at 580, but construed "in Alaska" in each to include the broad geographical region of Alaska, including the OCS and its superjacent waters. Id. at 575. Therefore, in the sea-ice areas beyond

the State's 3-mile limit, the Court of Appeals applied both ANCSA's extinguishment provisions and ANILCA's subsistence protections. ICAS and UIC's petition for certiorari was denied, 106 S. Ct. 68 (1985), and ICAS v. United States came to an end.

Now, however, the Petitioners argue that ANILCA does not apply to the OCS region (although they are presumably satisfied with the Court of Appeals' holding in Gambell I that ANCSA does apply there). Amici wish to remind the Court that the interpretations of ANILCA and ANCSA are inextricably intertwined. If ANILCA does not apply to areas not specifically "in Alaska," then ANCSA does not either, and the Native people retain aboriginal rights there. If so, Petitioners should be precluded from continuing their development activities in the OCS to the extent that such activities

interfere or impinge upon those aboriginal rights, unless and until the Natives consent to those activities, or until aboriginal rights in the area are properly and lawfully extinguished. Neither of these conditions has been satisfied, and Petitioners' development activities are properly subject to injunction.

If this Court holds that neither ANCSA nor ANILCA applies in areas not legally "in Alaska," it should remand this case to the Court of Appeals for a determination of whether other legal theories preclude aboriginal rights in the case ar a, or to the District Court to provide to the Respondents the opportunity to prove, as a factual matter, their use and occupancy of the areas in dispute.

SUMMARY OF ARGUMENT

For centuries the Native people of Alaska have made continuous, extensive and exclusive use of vast areas of rural

Alaska and adjacent marine areas. Their occupancy of territory outside the State of Alaska, but subject to United States jurisdiction and control, gives rise to aboriginal rights under federal law which have never been extinguished. The Village of Gambell plaintiffs initiated this action to prevent outside oil developers from interfering with their occupancy of sea and sea-ice areas which had long served as their hunting and fishing grounds. Such interference both violates their aboriginal rights and threatens the destruction of the Eskimos as a people.

The Court of Appeals in Gambell I acknowledged as unique and undisputed the factual basis for the Natives' claim:

> Factually, no aboriginal group has ever used water and ice as intensely as have the Eskimos. For about half the year, water up to 65 miles from the Arctic coast is frozen solid. The resulting ice areas resemble the tundra, and during this period the Eskimos treat the ice as a mere extension of the land. They set up

> camps on the ice. They build roads on it. And, most importantly, they hunt and fish on it. . . . Eskimos have relied on the sea to provide them with most of their necessities. They have relied on the oceans to provide them with food, clothing, fuel, and the basic material for making hunting equipment such as kayaks and harpoons . . . .
>
> Because ice areas are not physically different from land during long periods of the year, and because Eskimos have generally relied on the oceans for most of their food, fuel, and clothing, they have not traditionally recognized sharp distinctions between land and water. Simply stated, the sea is so central to the life of an Eskimo that s/he recognizes no distinctions between the two.

Gambell I at 576. The Eskimo occupation of the sea-ice and the rights which flow therefrom are not based on a technical or fictitious presence of any sort.

The threat to Eskimo survival from OCS development has steadily increased. There have been two major 5-year OCS leasing schedules since 1980 contemplating at least eleven major federal lease sales off northern and western Alaska.

An EIS relating to just one sale admits that "[d]isturbance of key species and use areas which the villages of Barrow, Nuiqsut and Kaktovik use for subsistence is very likely." The EIS authors expected that that sale "could have severe effects on the viability of the Inupiat people over time," and could jeopardize the "continued existence" of the bowhead whale, upon which they depend.[1] Thus, the amici are concerned not for abstract legal rights but for their continued physical existence.

The Court of Appeals in Gambell I recognized that ANCSA and ANILCA are related statutes and determined that both the extinguishment provision of ANCSA, 43 U.S.C. § 1603(b), and the subsistence provisions of ANILCA, including 16 U.S.C.

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[1] Bureau of Land Management, Diapir Field Final EIS, OCS Proposed Oil and Gas Lease Sale 71 (May 1982) at E-17, 136.

§ 3120(a), apply not only within the legal boundaries of the State of Alaska but in the entire geographic vicinity, including the OCS and its superjacent sea-ice and waters. Although Petitioners now challenge the applicability of ANILCA to the OCS, amici believe that the related decision to construe ANCSA to apply outside the State's borders is more clearly in error. In reaching the conclusion that ANCSA extinguishes aboriginal rights outside Alaska, the Court of Appeals failed to heed this Court's repeated admonitions that a Native people's aboriginal rights are secured by Federal law. And, it refused to apply the rules of construction that this Court has held must be applied to a statute affecting Native rights.

The Ninth Circuit's in-Alaska-means-outside-Alaska holding is all the more incredible in light of history of Gambell

I. On a motion for a preliminary injunction, Judge Fitzgerald found that the Native plaintiffs did not have a strong likelihood of success in establishing that "public lands in Alaska" included areas outside Alaska. Order (March 14, 1983) at 7. On motions for summary judgment, Judge von der Heydt ruled that "in Alaska" was limited to areas within State boundaries, and rejected plaintiffs' efforts to "manufacture an ambiguity":

> To determine the meaning of "public lands" the court need merely look to the definitional section of Title I of ANILCA. . . . Public lands means "land situated in Alaska" to which the United States holds title. . . . The court believes the plain meaning of this phrase is clear and rejects plaintiffs' attempts to manufacture an ambiguity. The court has also reviewed the legislative history and further concludes there is no persuasive evidence that Congress intended the phrase "public lands", as used in § 810(a), should include offshore lands and waters outside the territorial boundaries of Alaska. It is significant to the court that Congress did not mention the Outer Continental Shelf in

> deliberations concerning both § 102(3) and § 810(a).

Memorandum and Order (April 4, 1983) at 2. Counsel for the federal and oil company defendants conceded, in briefs and oral argument to the Court of Appeals, that "in Alaska" has a clear meaning, and that the OCS is not "in Alaska."[2]

Thus, when the Court of Appeals held that, by extinguishing aboriginal rights "in Alaska," Congress also extinguished the Natives' aboriginal rights outside Alaska, it overrode the concessions of the parties and the rulings of both of the District Judges for the District of Alaska. Its holding sends a green light to other courts to construe sua sponte statutes that, like ANCSA, terminate some

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[2] See, e.g., Opposition of Appellees ARCO Alaska, Inc., et al., to Plaintiffs' Emergency Motion for Injunction Pending Appeal, at 35 (April 20, 1983); see also ICAS v. United States, 746 F.2d 570 (1984), Brief of Federal Appellees at 34 n.22 (April 1983).

Native rights, in overly broad and unintended ways.

ARGUMENT

In reviewing the geographic scope of ANILCA, this Court should reverse the Court of Appeals' holding in Gambell I regarding the geographic scope of ANCSA for the following reasons:

1. This Court has always protected Indian title and aboriginal rights from encroachment by governmental or private parties. The failure of the Court of Appeals to uphold Native rights in areas where the United States has extended its jurisdiction and control is inconsistent with this Court's rulings and sets dangerous new precedents. The consequences here are especially significant: This case does not involve ancient claims by the distant descendants of an Indian tribe long since assimilated into American life, but the present-day rights of

an aboriginal people that, to this day, depend upon aboriginal subsistence activities in some of the most isolated areas of North America.

2. This Court has always held that Native rights are not to be abrogated by implication and that statutes dealing with Indian rights must therefore be explicit as to any such abrogation. In defiance of this, the Court of Appeals held that ANCSA impliedly abrogates Native rights by interpreting the term "in Alaska" to mean, in effect, "outside Alaska." This departure from settled rules of decision in cases involving Native rights threatens Native rights nationwide and leads to absurd results.

A. The Gambell I Opinion Establishes a Novel and Erroneous Departure from the Law of Aboriginal Rights, Violating Principles That Have Been Established for Two Centuries.

In attempting to deal with the Eskimos' compelling factual situation, the Court of Appeals enunciated a new principle of the law of aboriginal rights; it held that a statute extinguishing rights in one location should be read to extinguish rights in another. This proposition is manifestly erroneous, and requires the misconstruction or contradiction of decisions of this Court spanning two centuries, which have shown a commitment to protecting aboriginal rights even in extraordinary circumstances.

From Chief Justice Marshall's observation in 1832, that the protection of aboriginal occupancy rights is "evidenced by our history, in every change through

which we have passed," Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544 (1832), to the Court's reminder in March of 1985 that the "Indians' right of occupancy is 'as sacred as the fee simple of the whites,'" County of Oneida v. Oneida Indian Nation, 470 U.S. ___, 84 L. Ed. 2d 169, 179 (1985) (Oneida II), this Court has insisted that aboriginal rights be respected as American jurisdiction is extended to new areas:

> From the first Indian claims presented, this Court recognized the aboriginal rights of the Indians to their lands. The Court spoke of the "unquestioned right" of the Indians to the exclusive possession of their lands, and stated that the Indians' right of occupancy is "as sacred as the fee simple of the whites." This principle has been reaffirmed consistently. Thus, as we concluded in Oneida I, "the possessory right claimed [by the Oneidas] is a federal right to the lands at issue in this case."

Id. (citations omitted; emphasis in original).

In this context, the Court has stated that its decisions "emphasize 'Congress' unique obligation toward the Indians.'" Id. at 191; Morton v. Mancari, 417 U.S. 535, 555 (1974). In Oneida II, the Court held that the tribal rights at stake were valid and enforceable notwithstanding a 175-year delay in the commencement of a lawsuit to secure the tribe's claim. Irrespective of the unusual facts of that case, and the potentially dramatic consequences it raised for land titles in New York State, the Court could find no relevant legal basis for holding the Oneidas' claims barred.

Here, the unusual setting of the Eskimos' aboriginal domain has led the lower courts to repudiate aboriginal rights without any bona fide legal basis for doing so. The Court of Appeals' holding that such rights can be extinguished by implication is a frontal

assault on the doctrine of aboriginal rights, and is totally without merit.

B. Aboriginal Rights Are Cognizable in Sea-Ice Areas.

The Court of Appeals assumed rather than decided that plaintiffs had aboriginal rights in the sea-ice areas above the Norton Sound lease-sale area. Gambell I at 573 n.1. Native rights in sea-ice area far from shore are, as shown below, a matter of factual proof. They are not fundamentally unusual as a matter of law.

The nature and scope of Native aboriginal rights is governed by several well-defined principles, which have been established since "the time of the Revolutionary War." Oneida II at 178. First and foremost, aboriginal rights do not arise form treaties or statutes, but from the provable facts of aboriginal use and occupancy. United States v. Santa Fe

Pacific R.R. Co., 314 U.S. 339, 345 (1941); Kramer v. United States, 261 U.S. 219, 229 (1923). The Court has emphasized that the Native use and occupancy entitled to legal protection is to be determined with reference to the way of life, habits, customs and usages of the Natives, and not by Anglo-American property concepts. Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835).

As a result, aboriginal rights have been recognized or acknowledged, by treaty or otherwise, both with respect to inland waters[3] and in ocean waters[4].

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[3] Worcester v. Georgia, 31 U.S. (6 Pet. 515 (1832); Oneida Tribe of Indians of Wisconsin v. United States, 165 Ct. Cl. 487 (1964); United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), remanded on other grounds, 623 F.2d 448 (6th Cir. 1980), decree modified, 653 F.2d 277 (6th Cir. 1981).

[4] Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962); Washington v. Washington State Commercial Passenger Fishing Vessel

Congress has also repeatedly acknowledged its duty to protect Native rights in ocean areas in a variety of contexts. See, e.g., Marine Mammal Protection Act, 16 U.S.C. §§ 1367-1407; Fisheries Conservation and Management Act, 16 U.S.C. §§ 1801-82; Endangered Species Act, 16 U.S.C. §§ 1531-42.

Recognition of fundamental Native rights and interests in offshore areas, including rights secured by treaty, continues to be the acknowledged policy of the United States. See, for example, Treaty with Canada Concerning Pacific Salmon, done Jan. 28, 1985, T.I.A.S. No.___, art. XI; Pacific Salmon Treaty Act of 1985, Pub. L. No. 99-5, 99 Stat. 7 §§ 2(H), 3(a), 3(c)(4), 3(e)(3) and 4(b). See also Kaiser Aetna v. United States, 444 U.S. 164 (1979); Carter v. Hawaii,

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Ass'n, 443 U.S. 658 (1979).

200 U.S. 255 (1906); Damon v. Hawaii, 194 U.S. 154 (1904), in which the Supreme Court upheld extensive private rights in ocean waters and navigable ponds despite the absence of such rights at common law. Carter and Damon, in particular, were heavily relied upon by the Interior Solicitor in his decision in Aboriginal Fishing Rights in Alaska, 57 Int. Dec. 461 (1942), in which he held that the extent of Native rights in offshore areas had to be determined with reference to the facts of Native use and occupancy.

Aboriginal rights as a doctrine presumes federal paramountcy, and aboriginal rights in an area become secured under federal law when federal jurisdiction extends to cover territory occupied by Natives.

Congress has acted consistently with this understanding, even when extending federal jurisdiction into marine areas.

In 1953, it enacted the Submerged Lands Act (SLA), 43 U.S.C. §§ 1301 et seq., and the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331 et seq. The latter asserted federal jurisdiction and control over submerged lands beyond state boundaries. A House Report makes it clear that Congress did not believe that the federal government's paramount powers under United States v. California, 332 U.S. 19 (1947), and its progeny by themselves defeated valid pre-existing rights.

> OCSLA asserts Federal jurisdiction and control over the Continental Shelf areas beyond original State boundaries, thus bringing the land and resources within such areas into the same legal status as those acquired by the United States through cession or annexation; in the alternative, such lands and resources are subject to the doctrine of discovery. Adherence to the policy heretofore observed in connection with similar lands and resources brought under national dominion requires as a matter of policy and law, that the property rights of individuals in

> and to such lands and resources be recognized and confirmed.

H. Rep. No. 215, 83d Cong. 1st Sess., reprinted in U.S. Code Cong. & Ad. News 1385, 1441 (1953) (emphasis added).[5]

In 1976, Congress enacted the Fisheries Conservation and Management Act, 16 U.S.C. §§ 1801 et. seq. That Act extended United States jurisdiction to regulate marine fisheries from the existing territorial sea to 200 miles from the

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[5] Both SLA and OCSLA contain savings clauses which provide that: "Nothing herein contained shall affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to this [Act] . . . . " 43 U.S.C. §§ 1315, 1342. The Senate Report on SLA explained that this savings clause "follows the historic Congressional practice of exempting form the operation of statutes of this character existing third party rights, if any there be." S. Rep. No. 133, 83d Cong., 1st Sess. 21 (1953). Similarly, the Senate Report for OCSLA stated: "Section 14 is a 'Savings Clause," in that it protects any rights in the Outer Shelf area that may have been acquired prior to the effective date of the Act." S. Rep. No. 411, 83d Cong., 1st Sess. 14 (1953).

coastline. The Senate Commerce Committee emphasized that the Act should not be construed to affect the fishing rights of Native Americans, whether established by treaty or any other law. S. Rep. No. 416, 94th Cong., 1st Sess. 36 (1975). Again, such Congressional action cannot be squared with the proposition that Native rights are abrogated by the mere extension of United States sovereignty into ocean areas. Instead, as we have observed, the real significance of these statutes is that they trigger the federal government's duty to protect pre-existing Native rights in those areas. See Passenger Fishing Vessel, supra, 443 U.S. at 668.

There is no reason to create a brick wall at the ocean's edge, beyond which basic principles of American law, recognized since the Revolutionary War, cannot apply. As this Nation increasingly as-

serts its sovereignty in ocean areas[6], it is imperative that the fundamental protections accorded to and required by Natives by the federal doctrine of aboriginal rights continue in force.

C. The Court of Appeals' Opinion Authorizes Broad and Unprincipled Extensions of Statutes Abrogating Indian Rights and Is Inconsistent with the Opinions of This Court.

The rule in Indian law is that ambiguities in statutes are to be construed in favor of the Indians. This canon has been said to be "eminently sound and vital," Bryan v. Itasca County, 426 U.S. 649, 655 n.7 (1976), and has been consistently reaffirmed:

> The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the

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[6] See, e.g., Exec. Proc. 5030, 48 Fed. Reg. 10605 (March 10, 1983), proclaiming a 200-mile Exclusive Economic Zone in which the United States has extensive sovereign rights and jurisdiction.

> Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. "Absent explicit statutory language," this Court accordingly has refused to find that Congress has abrogated Indian treaty rights.
>
> The Court has applied similar canons of construction in non-treaty matters. Most importantly, the Court has held that Congressional intent to extinguish Indian title must be "plain and unambiguous," and will not be "lightly implied." Relying on the strong policy of the United States "from the beginning to respect the Indian right of occupancy," the Court concluded that it "[c]ertainly" would require "plain and unambiguous action to deprive the [Indians] of the benefits of that policy."

Oneida II at 187 (citations omitted).

The Ninth Circuit's decision stands in blatant defiance of these principles. Here, the court began with a statute that, on its face, is clear and unambiguous: The extinguishment provisions of ANCSA apply "in Alaska," and nowhere else. There is no "plain and unambiguous" statement that aboriginal rights

outside Alaska are extinguished. Under the principles reaffirmed in Oneida II, that should have ended the matter.

The Ninth Circuit, however, combed the legislative history in order to "manufacture an ambiguity." Then, in analyzing that history, it ignored the repeated statements by congressmen, congressional committees, and key witnesses at congressional hearings, that the scope of the settlement was coextensive with the State of Alaska. Instead, it relied on an isolated comment by a private party in a 1969 hearing. On the basis of that comment, it held that Congress in 1971 extinguished aboriginal rights outside Alaska, despite the plain language of the statute.

This holding makes a mockery of this Court's decisions and invites other courts to cast aside settled rules of statutory construction whenever Congress

extinguishes some Indian rights. In that setting, the Ninth Circuit apparently believes it is free to expand the extinguishment provisions at will. This Court should correct that holding.

1. There Is No Ambiguity in ANCSA; By Creating One, the Court of Appeals Wreaks Havoc with Rules Defining State Boundaries, and Contravenes Basic Principles of Federal Law.

By its terms, § 4(b) of ANCSA only extinguishes aboriginal rights "in Alaska." 43 U.S.C. § 1603(b). The language in the statute, which extinguishes aboriginal title in submerged lands "both inland and offshore" is qualified by specific reference to areas "in Alaska."

The Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339, § 2 (1958), provides that "[t]he State of Alaska shall consist of all the territory, together with the territorial waters appurtenant thereto, now included in the

Territory of Alaska." Under firmly established law, "territorial waters" comprise a three-mile belt adjoining the coastline. United States v. California, 332 U.S. 19, 33 (1947). Section 6(m) of the Statehood Act made applicable to Alaska the Submerged Lands Act, 43 U.S.C. §§ 1301 et seq., which limits the seaward boundary of Alaska to "a line three geographical miles distant from its coastline." 43 U.S.C. § 1312. Thus, by referring to areas "in Alaska," Congress referred to well-defined territory, known to comprise approximately 375 million acres.

When Congress has intended to legislate with respect to OCS areas outside state boundaries, it has done so expressly. For example, in the Energy Policy and Conservation Act, Congress stated that "[t]he term 'United States' when used in the geographical sense means all

of the States and the Outer Continental Shelf." 42 U.S.C. § 6202(5) (emphasis added). See id., § 6202(10). Conversely, in the many statutes in which it has legislated with respect to areas "in" a particular state, its intent clearly was to reach only to the boundaries of that state, and not to vast areas beyond. See, e.g., 43 U.S.C. § 391, establishing the Reclamation Fund with monies received from the sale of public lands "in . . . California, . . . Oregon [and] Washington," among other states. It has never been suggested, of course, that monies received from the sale of OCS lands bordering these states are subject to the provisions of § 391.

The term "in Alaska" is itself used in numerous sections of ANCSA in addition to § 4. That "in Alaska" means exactly what it says is most clear in 43 U.S.C. §§ 1610, 1611, 1616 and 1621 (and also

§ 6(b) of the Statehood Act), in which rights in "public lands in Alaska" are discussed.[7] These sections provide, among other things, for land withdrawals, exchanges, and selections "in Alaska" by the State and regional corporations. Obviously, it was not Congress' intention that the State and Native regional corporations might select, or acquire through exchange with the Secretary of the Interior, OCS lands outside state boundaries.

In short, there is no ambiguity here. By artificially creating one, the Ninth Circuit opinion wreaks havoc with statutes applicable "in" particular states, threatening to create absurd results. In the special context of Indian aboriginal rights, the court's

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[7] "Public lands" are defined, in 43 U.S.C. § 1602(e), as all Federal lands and interests therein located in Alaska," with limited exceptions.

manufactured ambiguity is squarely inconsistent with this Court's decisions safe-guarding such rights.

2. ANCSA's Legislative History Provides No Support for the Extraordinary Decision of the Court of Appeals.

S. 1830, 91st Cong., 1st Sess. (1969), a predecessor to ANCSA, provides direct evidence that Congress understood that the OCS is not "in Alaska." Section 12 of S. 1830 earmarked certain mineral revenues for Alaska Natives. Subsection 12(a)(1) addressed minerals "located in all public lands in Alaska." Subsection 12(c), separately addressed minerals "from the Outer Continental Shelf bordering the State of Alaska." In drafting and introducing this bill, the Administration and the Senate Committee on Interior and Insular Affairs demonstrated a clear understanding that the OCS is not "in Alaska."

Despite this the Court of Appeals reads "in Alaska" to include, in addition to the 375 million acres within Alaska, hundreds of millions of acres comprising the OCS outside Alaska.[8] It finds ambiguity in the phrase "in Alaska" on the basis of the definition of Norton Sound in Webster's New Geographical Dictionary and in the language and legislative history of ANILCA, which was enacted nine years after ANCSA. Gambell I at 575-76.

ANCSA's legislative history indicates that Congress was well aware that the geographic scope of the Act was coincident with the State. For example, the committee reports repeatedly characterize the subject of ANCSA as Native

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[8] In debates on ANILCA, the OCS bordering Alaska was stated to comprise from 203 to 300 million acres. See 124 Cong. Rec. S10, 106-07 (daily ed. June 29, 1979) (Sen. Stevens) (258.4 million acres), 125 Cong. Rec. 44 (1979) (Rep. Udall) (203 million acres); id. at 10,285 (Rep. Seiberling) (300 million acres).

claims "to the lands which now comprise the State of Alaska." Notably, this characterization is found in the Senate committee reports on bills containing extinguishment provisions that in all material respects are identical to those enacted,[9] and was repeated on the floor of the Senate by Senator Jackson, the Chairman of the Committee on Interior and Insular Affairs.[10] Furthermore, key congressmen repeatedly referred to the Native claims being extinguished as claims

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[9] See S. Rep. No. 91-925, 91st Cong., 2d Sess. 46, 47 (1970) ["1970 Senate Report"]; S. Rep. No. 92-405, 92d Cong., 1st Sess. (1971), reprinted at 117 Cong. Rec. 38435, 38436 (1971). See also H.R. Rep. No. 92-523, 92d Cong., 1st Sess (1971), reprinted in [1971] U.S. Code Cong. & Ad. News 2192, 2241 ["1971 House Report"], in which Rep. John Saylor, the ranking minority member of the House Committee on Interior and Insular Affairs, stated that the Act settled claims "based on aboriginal use and occupancy of lands comprising the State of Alaska."

[10] 116 Cong. Rec. 24208 (1970); 117 Cong. Rec. at 38433 (1971).

covering "the State of Alaska," "375 million acres," or "land in the State"; none referred to claims covering, in addition, the vast ocean areas outside Alaska.[11]

Congress' intent to settle only Native claims within the State is consistent with the underlying purpose of the Act, which was to resolve the conflict under the Statehood Act between Native claims and State land selection rights. This was a conflict that, like the State-

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[11] See, e.g., Hearings Before the House Subcomm. on Indian Affairs on H.R. 3100, H.R. 7039, and H.R. 7432 (1971) ["1971 House Hearings"] at 65 (Rep. Aspinall, Chairman, House Comm. on Interior and Insular Affairs; "maximum of 375 million acres"); 340 (Rep. Begich, Alaska; "375 million acres"); and 370 (Harrison Loesch, Assistant Secretary of the Interior, "the entire State of Alaska"); 117 Cong. Rec. at 36854 (Rep. Aspinall; "375 million acres," "most of the State"), 36857 (Rep. Haley; "land in the State"); 38443 (Sen. Allot; "300 million acres"); and 38445 (Sen. Harris; "nearly all of the State's 375 million acres of land").

hood Act, pertained exclusively to areas within the State, and did not implicate ocean areas outside State boundaries.

The Senate Committee noted that the United States would not be the

> main beneficiary from clearing title to lands in Alaska . . . To the State of Alaska, a settlement would remove the cloud which the Native Claims cast on all land titles in Alaska . . . [State selections under the Statehood Act could then] proceed, free from the threat of litigation and conflicting claims.[12]

In contrast, nowhere in the voluminous legislative history is there the slightest suggestion that the federal government would benefit from ANCSA because of its interest in the OCS, although other federal benefits were noted.[13] The purpose of the Act was to resolve the conflicts created by Native claims within

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[12] 1971 Senate Report at 83, 86.

[13] See, e.g., 117 Cong. Rec. at 36469 (clearing federal title to land within the State).

the State, not to settle claims to vast areas outside Alaska.

The legislative history relied upon by the Court of Appeals fails to support its extraordinary expansion of the geographic scope of ANCSA. For its version of ANCSA's legislative history, the Court of Appeals relied largely on the statements in Congressional hearings by representatives of the Alaska Federation on Natives ["AFN"], the Western Oil and Gas Association ["WOGA"], the State of Alaska, and the National Wildlife Federation ["NWF"]. Gambell I at 578. It did not cite the statement of a single congressman or congressional committee indicating that ANCSA would be applied outside state boundaries. The consistent focus of the statements it did cite was the inclusion in ANCSA's extinguishment provisions of waters, submerged lands, and hunting and fishing rights within state boundaries,

not the extension of the Act to vast areas outside Alaska.

AFN representatives, for example, clearly understood the Act to apply only within the State. The following statements are illustrative:

> By its actions on these bills Congress will extinguish our valid land rights in approximately 375 million acres of land in Alaska . . . Fundamentally these bills are in many respects quite similar. All of them would extinguish our land rights throughout the State of Alaska.
>
> AFN believes a settlement extinguishing the property rights of the Natives to substantially the entire State of Alaska must recognize that different groups of Alaska Natives have property rights in different lands aboriginally used and occupied by them.
>
> We are not asking for anything. We are offering the U.S. Government 84 percent of our property. We are offering them 300 million acres to satisfy the needs of others in this State and to satisfy the needs of the United States in the way of

> Federal reserves, wildlife refuges, wilderness areas.[14]

Similarly, the State, in urging that the settlement extend to "lands, waters, and submerged areas in Alaska,"[15] gave no indication that it should encompass areas outside the state. Nor did NWF argue for a geographic enlargement of the Act. Even the WOGA statements are far from clear on this point. While its statements in the course of the 1969 hearings do contain passing references to the OCS, no such references are found in its subsequent statements.[16]

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[14] 1971 House Hearings at 181; Hearings Before the Senate Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971) ["1971 Senate Hearings"] at 353, 475 (emphasis added).

[15] Hearings Before the Senate Comm. on Interior and Insular Affairs on S. 1830, 91st Cong., 1st Sess. (1969) at 234.

[16] For example, with respect to H.R. 3100, which extinguished claims of "aboriginal title <u>in Alaska</u> . . . including any aboriginal hunting and fishing rights that may exist" and claims

The Court of Appeals also suggested that "Congress could not have been unaware of such widely known facts of Native Alaskan life," referring to Native use and occupancy of ocean areas far outside State boundaries. Gambell I at 576. Yet to document such facts, the panel turned to materials that were published after the enactment of ANCSA, such as the 1982 Norton Sound EIS. Id. at 576-77. The scant testimony it cites from the ANCSA hearings does not identify whether the areas being discussed were inside or

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"based on . . . use or occupancy of land or water areas in Alaska," WOGA said:

> The Declaration of Settlement contained in section 2 of H.R. 3100 is complete and comprehensive, and we have no changes to suggest in it. In particular, section 3 extinguishes claims to water, as well as land, which is needed because some of the claims are asserted for water areas.

1971 House Hearings at 2, 353.

outside the three-mile expanse of coastal waters.

Finally, the Court of Appeals observed that "the needs of Natives for subsistence hunting and fishing were considered in determining the amount of land granted the Natives . . . ; the land was granted, in part, 'in lieu of subsistence hunting and fishing rights' . . . . " Gambell I at 576. Yet it is clear that no provision in ANCSA -- including the Native land grants -- provides even the remotest protection for subsistence activities in the areas at issue in this case. The total absence of such protection simply confirms that these areas are not within the scope of ANCSA.[17]

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[17] Even in Alaska the allocation of land to the Eskimos was inadequate for subsistence purposes because it was done on the basis of population, not subsistence needs. Given the climate and geography of northern and western Alaska, hunters range more widely in pursuit of game than Natives from other regions.

Thus, on the basis of a passing reference by a private party in a 1969 hearing, the Court of Appeals held that, when it enacted ANCSA in 1971, Congress intended it to apply to millions of acres outside Alaska. This holding contradicts the legislative history and the clear understanding of virtually everyone involved.

3. The Court of Appeals' Resolution of Perceived Ambiguities Against the Natives Violates Fundamental Principles of Federal Indian Law.

The Court of Appeals' opinion states that "[t]he possibility of two meanings of the phrase "in Alaska" renders the provision ambiguous, justifying reference to the legislative history." Gambell I

The Act's provision of comparatively small parcels to the Eskimos failed to recognize this. To now interpret ANCSA to extinguish rights outside Alaska exacerbates this disproportion between the territory granted to the Eskimos by ANCSA and the territory they need to survive.

at 575. While we believe that there is no such ambiguity, and that the court's legislative history analysis is incomplete and unfair, its most egregious error is its failure to acknowledge and apply the settled rule that ambiguities in statutes affecting Indians are to be construed in the Indians' favor. This departure from settled rules of decision in Indian cases sets a dangerous precedent of national significance.

The Ninth Circuit apparently believed that it could disregard these rules because ANCSA was intended to terminate some Native rights. But ANCSA is not alone in this respect. For example, commencing in 1954, Congress enacted a series of termination statutes, which abrogated certain rights of specified Indian tribes throughout the United States. See generally, F. Cohen, Handbook of Federal Indian Law, 152-80, 810-18 (1982

ed.). Even in construing these statutes, the Court adhered to the traditional rules of decision applicable in Indian cases. See, e.g., Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1968) (termination of reservation held not to extinguish hunting and fishing rights). The Court of Appeals' approach to ANCSA -- that in construing a statute terminating some Native rights there is no need to adhere to settled rules of decision in Indian cases -- thus sets the wrong precedent for construing a significant number of existing and prospective federal statutes. See Oneida II at 191 (discussing eastern land claim settlement acts).

The danger of this approach is amply illustrated by the decision in this case. If, in the light of uniform indications in the legislative history that Congress understood it was legislating with

respect to the State of Alaska, the phrase "in Alaska" can be "construed" to mean "in or out of Alaska," then the pledge to "respect the Indian right of occupancy," Oneida II at 187, has been reduced to an empty and cynical gesture.

The Ninth Circuit itself has held that statutes passed for the benefit of Indians "'must be interpreted as [the Indians] would have understood them, . . . and any doubtful expressions in them should be resolved in the Indians' favor.'" Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1257 n.6 (9th Cir. 1983), quoting Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970).[18]

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[18] In United States v. Atlantic Richfield Company, 612 F.2d 1132, 1139 (9th Cir. 1980), the Court of Appeals held that this principle "operates with less force" because the Natives were represented by "such illustrious counsel as former Supreme Court Justice Arthur Goldberg and former Attorney General Ramsey Clark." In fact, however, during the hearings on the Act, the Eskimos were

Statements in ANCSA's legislative history to the effect that the extinguishment of aboriginal rights should be construed broadly, Gambell I at 575 n.3, do not obviate this principle; those statements hardly can be said to authorize a court to enlarge the geographic scope of the Act.

The principle is particularly important here, since ANCSA was politically dependent upon acceptance by Natives for its enactment. One of the basic parameters of such acceptance was that the Act was applicable within the State. The Native arguments on compensation were

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largely represented by the Arctic Slope Native Association (ASNA), not by the Alaska Federation of Natives, Justice Goldberg, or Attorney General Clark. Indeed, ASNA took positions at odds with those taken by AFN, never accepted the Settlement Act, and ultimately urged President Nixon by telegram to veto it. See 1971 House Hearings at 296-314. In any event, the issue is what the Natives understood the statute to mean, not what their lawyers may have believed.

consistently based on the scope of the claims they were relinquishing, and those claims were consistently characterized as comprising areas within the State. For example, an Inupiat representative testified:

> [A]nything less than 60 million acres for the entire statewide settlement is an act of dishonor. That amount of land is about 16 percent of the total State. It seems to us that when the United States takes our land, the retention of anything less than 16 percent certainly qualifies as an act of dishonor.[19]

To judicially extend ANCSA to vast ocean areas outside the State, 13 years after its enactment, is indefensible. It is precisely this kind of "construction" that the principle that doubtful expressions be resolved in the Indians' favor was designed to avoid.

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[19] 1971 House Hearings at 246 (statement of Joseph Upicksoun, President, Arctic Slope Native Association).

CONCLUSION

Any examination of the geographic scope of ANILCA must include the interrelated issue of the geographic scope of ANCSA. The Court should reverse the Court of Appeals' holding on the geographic scope of ANCSA's extinguishment and remand this case for further proceedings.

Dated: October 2, 1986.

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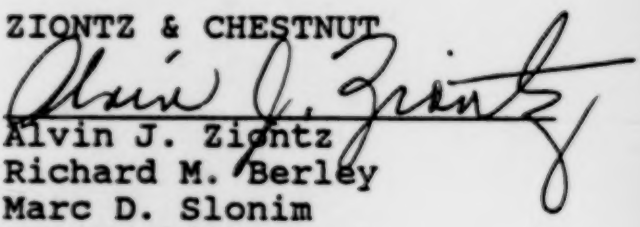

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DONALD P. HODEL, SECRETARY OF THE INTERIOR, et al., Petitioners,

AMOCO PRODUCTION COMPANY, et al., Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, et al., Respondents.

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Nos. 85-1239 and 85-1406

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DONALD P. HODEL, SECRETARY OF THE INTERIOR, et al., Petitioners,

AMOCO PRODUCTION COMPANY, et al., Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, et al., Respondents.

BRIEF AMICUS CURIAE OF THE STATE OF ALASKA

This brief is in support of respondents People of the Village of Gambell, et al. Under Supreme Court Rule 36.4, written consent of the parties is not required.

INTEREST OF THE STATE OF ALASKA

This suit concerns the applicability of section 810 of the Alaska

National Interest Lands Act (ANILCA), 1/ 16 U.S.C. § 3120, to Federal oil leasing activities on the Outer Continental Shelf (OCS) in Alaska. It further concerns the proper injunctive standard for a district court faced with an apparent substantial violation of that section. Section 810 of ANILCA requires a federal agency to consider the impact of land use decisions upon the subsistence uses and needs of the many rural Alaskans who are dependent on subsistence for their livelihood.

Alaska did not, and does not, oppose the Federal lease sales at issue in this litigation (OCS Lease Sale 83,

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1/ Act of Dec. 2, 1980, Pub.L.No. 96-487, 94 Stat. 2371, codified at 16 U.S.C. § 3101 et seq.

in the Navarin Basin and OCS Lease Sale 57, in Norton Sound). However, Alaska does oppose OCS Lease Sale 92, in the North Aleutian Basin (Bristol Bay). This latter sale was enjoined on the basis of the Ninth Circuit's holding in this case. Parties to the Bristol Bay litigation are currently seeking this Court's review of that injunction. Hodel v. Akutan, Nos. 86-303 and 86-304, (9th Cir. filed Aug. 26, 1986).

The Ninth Circuit correctly held that the procedural protections of section 810 of ANILCA apply to activities in the OCS; that these procedural requirements must be complied with prior to the decision to lease; and that an injunction is, absent unusual circumstances, the appropriate remedy when the requirements are not met. Because this Court's decision herein may well

dispose of the questions in the Bristol Bay litigation, to which Alaska is a party, the State of Alaska submits this brief to assist the Court in its resolution of these issues.

Alaska joins with the State of California, along with other amici, in its brief on the injunctive standard issue and does not separately address that issue in this brief. Alaska herein addresses the ANILCA issues.

ARGUMENT

A. SECTION 810 OF ANILCA APPLIES TO LEASING IN THE OCS

The Ninth Circuit has twice held that the Alaska Native Claims Settlement Act (ANCSA) 2/ applies in the

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2/ Act of Dec. 18, 1971, Pub.L.No. (Footnote Continued)

Outer Continental Shelf in Alaska, and by its terms extinguished all aboriginal rights, including hunting and fishing rights, therein. Inupiat Community of the Arctic Slope v. United States, 746 F.2d 570 (9th Cir. 1984) cert. denied, ___U.S.___, 106 S.Ct. 68 (1985); People of the Village of Gambell v. Clark, 746 F.2d. 572 (9th Cir. 1984). This Court has to date declined review of the Ninth Circuit's holding on this point: certiorari was denied in the Inupiat Community case (___U.S.___, 106 S.Ct. 68 (1985)), and the cross petition on this issue of the respondents in this case, filed in

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(Footnote Continued)
92-203, 85 Stat. 688 codified at 43 U.S.C. § 1601 et seq.

March 1986, has not yet been acted upon. The State of Alaska agrees with the Ninth Circuit that ANCSA was intended to, and did, extinguish all aboriginal claims in Alaska, including claims in the Outer Continental Shelf contiguous to Alaska.

Alaska further agrees with the Ninth Circuit that the strong Congressional policy to protect the subsistence way-of-life embodied in ANILCA can only be effected if ANILCA is construed in pari materia with ANCSA, to afford protection of subsistence resources in the same geographical area that ANCSA extinguished claims.

That Congress' intent was to provide strong protection for the subsistence way of life is evident from the statements of Congressional policy and purpose, from the Congressional

findings, and from the workings of the Act itself. The Act provides that "It is ... the intent and purpose of this Act ... to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." 16 U.S.C. § 3101(c). It is the policy of Congress that "the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence...." 16 U.S.C. § 3112(1). Congress found that the opportunity for subsistence uses is "essential" to the very "existence" of rural Alaskans, and that "in most cases, no practical alternative means are available to replace the food supplies [provided by] subsistence uses...." 16 U.S.C. § 3111(1),(2).

In the substantive provisions of the Act, Congress took strong steps to implement this policy. The Act provides that subsistence uses of fish and wildlife on public lands "shall be accorded priority" over non-subsistence uses. 16 U.S.C. § 3114. Local participation in fish and game management was established, and the State was required to provide for the subsistence preference on public lands or lose authority to manage those resources. 16 U.S.C. § 3115. The Secretary is required to monitor the implementation of the subsistence preference. 16 U.S.C. § 3116. Subsistence commissions were established in the national parks and monuments to devise programs for subsistence hunting within those units. 16 U.S.C. § 3118. Finally, and the subject of this litigation, the Act

directs federal agencies to evaluate the effect on subsistence of land use decisions, including the decision to "lease." 16 U.S.C. § 3120.

Taken together, these provisions indicate that Congress found that the subsistence way-of-life needed protection, and that Congress intended to protect it.

The provision of ANILCA that is at issue provides:

> In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands ... the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs ....

16 U.S.C. § 3120(a). The petitioners take the position that an oil and gas lease in the OCS is not a disposition

of "public lands" within the meaning of this section.

The term "public lands" is defined in ANILCA to mean "land[s] situated in Alaska which ... are Federal lands ...." The term "Federal land" is in turn defined as "lands the title to which is in the United States ...," and "land" means "lands, waters and interests therein." 16 U.S.C. § 3102. By combining the pertinent portions of the three definitions, the "public lands" to which ANILCA applies can be read to be "lands, waters and interests therein, situated in Alaska, the title to which is in the United States."

The oil companies and the United States encourage this Court to read this language not as it stands, but with substantial and substantive changes. According to them, the term

"public lands" is defined to mean "lands [WATERS AND INTERESTS THEREIN], situated in the State of Alaska, the formal, fee simple title to which is in the United States."

By omitting "waters, and interests therein" and including a requirement for formal, fee simple title, petitioners are able to rely on authority for the fact that the United States does not "own" the OCS. The parties do not dispute that the United States does not claim full legal title to the OCS in its entirety. But this lawsuit would not have arisen if the United States did not claim something in the OCS: this suit concerns the leasing of Federal oil and gas in the OCS. The oil companies do not claim that they may produce oil in the OCS without a lease from the United States.

While the United States does not claim all of the attributes of ownership in the OCS, it most assuredly does claim, as the brief for the United States points out, "sovereignty over the exploration and development of the natural resources on and within the OCS." Brief for the Federal Petitioners, quoting the Report of the House Committee on Merchant Marine and Fisheries on the 1985 OCSLA amendments. As the leases underlying this litigation exemplify, that sovereign claim includes the power to sell or otherwise dispose of those interests. Indeed, "interests" in the OCS are precisely what the United States does claim: full, complete and exclusive ownership of the natural resources (including mineral interests) found there.

The briefs of the United States and the oil companies are less than candid in their omission of any discussion of the words "waters, and interests therein" in ANILCA's definition of lands. The plain meaning of these words is that whatever the United States "has" is included within the ambit of the statute. The State submits that, where a sovereign is concerned, the power to dispose of a real property interest evidences sovereign "title" to that interest. 3/

3/ 43 U.S.C. § 1333(a)(1) provides, in part, that "The ... jurisdiction of the United States [is] hereby extended to the subsoil and seabed of the outer Continental Shelf ... to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State ...." In Guess v. Read, 290 F.2d 622 (Fifth Cir. 1961), cert. denied 368

(Footnote Continued)

Since it is not disputed that oil and gas in the OCS must be leased from the United States, it cannot be disputed that the United States has title to those interests.

Even if the United States has title to natural resources in the OCS, petitioners argue that leases of those resources are outside the reach of ANILCA because they are not "situated in Alaska." They would change those words to read "situated in the State of Alaska," thus limiting ANILCA's application to the formal State boundaries within three miles of shore.

(Footnote Continued)
U.S. 957 (1962) the court held that the "Continental Shelf Act was enacted for the purpose, primarily, of asserting ownership of and jurisdiction over the minerals in and under the Continental Shelf. 290 F.2d at 625.

ANILCA uses the term "Outer Continental Shelf" only once. 16 U.S.C. § 3141(a). That section directs the Secretary to "initiate and carry out a study of all Federal lands (other than submerged lands on the Outer Continental Shelf) in Alaska ...." The inference to be drawn from the use of this language in this section is that absent the parenthetical statement, the Secretary's study would have included the OCS. Since the language is used in no other provision in ANILCA, the conclusion should be drawn that the term "Federal lands" (and thereby the term "public lands") includes the OCS unless Congress has specifically stated otherwise. Congress has evidenced, by section 3141(a), that when it wishes to exclude the OCS it does so.

The words "in Alaska" are commonly understood to mean not only the land and waters within the three mile limit, but also those waters contiguous to the State. Many a Seattle fisherman heads north each summer to fish "in Alaska" even though almost all of his activity takes place outside three miles. See, e.g., Sjong v. State of Alaska Dep't of Revenue, 622 P.2d 967 (Alaska 1981), appeal dismissed, 454 U.S. 1131 (1982). The term "exempt Alaskan oil" in the Crude Oil Windfall Profit Tax Act (26 U.S.C. § 4991(b)(3)) includes oil produced in parts of the OCS off the state. U.S. v. Ptasynski, 462 U.S. 74, 77-78 (1983).

The words "in Alaska" commonly connote the waters contiguous to the state. Congress has evidenced its ability to exclude the OCS from the

reach of ANILCA when it intends to do so. Section 810 of ANILCA applies to the OCS because Congress did not specifically exclude it.

This construction is consistent with the Congressional purposes. Congress, quite simply, intended to protect the subsistence way of life. Congress enacted a subsistence preference for fish and wildlife on federal lands. Congress strongly encouraged the State to enact a subsistence preference by providing that unless the State adopted such a law, fish and game on federal lands would be managed by the United States. Because the subsistence resources upon which rural Alaskans rely do not respect arbitrary political boundaries either on land or at sea, the State's subsistence plan applies to both Federal and State waters and

lands. 4/ Congress stated that "the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence...."

Viewed in the light of the Congressional purposes, it is inconceivable that Congress intended to abandon its concern for subsistence at the three mile line. The Act as a

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4/ The State's fishing laws apply both in State waters and in the OCS. If it becomes necessary to limit commercial and sport harvesting of fishery resources in order to protect subsistence, the State limits those activities both within and without the three-mile limit. For example, the State closed waters to the taking of king crab in Norton Sound and around St. Lawrence, King and Little Diomede Islands. The waters were closed to protect subsistence harvest; the closures extend beyond the three-mile limit. 5 Alaska Administrative Code 34.935.

whole evidences a Congressional commitment that the United States will not unduly interfere with subsistence. Congress can not have intended that Federal oil leasing activities on land, where an oil spill can be fairly easily contained, must be undertaken only after an analysis of subsistence impacts, but at the same time that Federal activity which could have devastating effects on subsistence could take place just outside the three-mile limit with no regard for subsistence impact.

Finally, "in Alaska" must be construed to include the OCS in ANILCA because the phrase has been properly construed to include the OCS in ANCSA. ANCSA was intended to, and did, extinguish all aboriginal claims in Alaska. Many of those claims are based on

traditional hunting and fishing activities on the sea and on the sea ice in the coastal areas, that took, and take place without regard for the arbitrary three-mile limit. ANCSA was intended to be a fair and equitable settlement of all aboriginal claims. To conclude that Congress intended only to extinguish claims out to the three mile limit would be, as the State, the United States, the oil companies and the Ninth Circuit all agreed, "inconceivable." See, Brief for the United States in Opposition at 7, Inupiat Community of the Arctic Slope v. United States, No. 84-1801, July 1985.

When ANCSA was passed in 1971, Congress recognized that the transfer of land to the Natives was neither sufficient to nor intended to fully pro-

tect traditional subsistence activities. As the Ninth Circuit noted, the Senate version of ANCSA "included provisions directing the Secretary to protect subsistence uses on public lands." 746 F.2d at 580. Although the provisions were eliminated in conference, the committee report provided that the Committee "expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives." Id.

It was hoped that federal and state land and wildlife managers would provide sufficient subsistence opportunity without further legislation. By 1980, Congress was of the opinion that this hope was misplaced. As a result, and in conjunction with passing the national interest lands legislation

provided for in ANCSA (see 43 U.S.C. § 1616(d)), Congress adopted the strong subsistence protection of ANILCA. The two statutes are truly sister statutes, and must be construed, as the Ninth Circuit has held, in pari materia.

B. THE SECRETARY MUST COMPLY WITH SECTION 810 OF ANILCA PRIOR TO LEASING

The gravamen of section 810 is that a federal agency must consider the effects on subsistence of proposed federal action in the decision-making process. Like the studies required by the National Environmental Policy Act (NEPA), 5/ the purpose of the section 810 analysis is to give the decision

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5/ 83 Stat. 852, 42 U.S.C. § 4321 et seq.

maker the best information on which to base the decision. Also like NEPA, while ANILCA section 810 is based on "significant substantive goals," its protections are "essentially procedural." Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978). Once the procedural requirements have been met, ANILCA provides that the agency may "manage or dispose of public lands ... for any of those uses or purposes authorized by ... law." 16 U.S.C. § 3120(d).

Congress declared that it was its policy that public lands be utilized so as to "cause the least adverse impact possible on ... subsistence uses ...." 16 U.S.C. § 3112(1). Congress wanted rural residents to have a meaningful role in decisions that might affect subsistence. 16 U.S.C. § 3111(5);

§ 3112(3). In furtherance of these policies, Congress provided that "[i]n determining whether to ... lease ... public lands" the Secretary must evaluate the effect of the action on subsistence, and must consider alternatives. Whenever the proposed Federal action threatens subsistence activities, the Secretary must give notice to the State and to subsistence groups, must notice and hold hearings, and must determine that a restriction of subsistence is necessary, that the minimal amount of lands necessary are involved, and that reasonable steps will be taken to minimize impacts on subsistence. 16 U.S.C. § 3120(a).

The clear terms of the section require the Secretary is to fully consider subsistence in deciding whether to lease. A hypothetical will serve to

illustrate the point. If the Secretary were faced with the choice of leasing one of two tracts, and the tracts were identical in their oil potential, and the projects as a whole would have the identical environmental impacts, but production from one tract would impact subsistence while production from the other tract would not, section 810 encourages the Secretary to choose the tract with no impact on subsistence.

The Secretary argues that the notice and hearing requirements of section 810 are not triggered at the lease sale stage if the impact on subsistence would not occur until the production stage. But this construction of section 810 would render the inclusion of the word "lease" in the section meaningless. For the mere act of leasing cannot, in and of itself, have an impact

on subsistence. ANILCA was enacted after the 1978 amendments to the OCS Leasing Act. As this court has noted, those changes clarified that "the purchase of a lease entitles the purchaser only to priority over other interested parties in submitting for federal approval a plan for exploration, production, or development." Secretary of Interior v. California, 464 U.S. 312, 337 (1984). Since leasing, in and of itself, cannot impact subsistence, Congress must have intended that the Secretary's consideration of subsistence impact extend to the project as a whole.

In concluding that notice and hearing can be delayed until the production stage, petitioners rely on this Court's holding in Secretary of Interior v. California. That case

examined the need, at the lease sale stage, for a coastal zone consistency determination under section 307(c)(1) of the the Coastal Zone Management Act (CZMA). 6/ The word "lease" was not in that Act, and this Court found that Congress had expressly omitted it. 464 U.S. at 334. "It is surely not for us to add to the statute what Congress twice decided to omit." Id. at 334-335. Here, Congress has specifically included the word "lease," and it is just as surely not for this Court to read out of the statute a word that Congress has specifically chosen to include.

6/ 86 Stat. 1285, 16 U.S.C. § 1456(c)(1).

Where the objective of the statute is to provide good information to aid in reasoned decision making, courts have required that the project be examined in its entirety rather than piecemeal. See, e.g., North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980); Commonwealth of Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983); Conservation Law Foundation v. Andrus, 623 F.2d 712 (1st Cir. 1979); Commonwealth of Massachusetts v. Andrus, 594 F.2d 872 (1st Cir. 1979); County of Suffolk v. Secretary of the Interior, 562 F.2d 1368 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978); Sierra Club v. Morton, 510 F.2d 813 (5th Cir. 1975); Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984). The rationale for this rule is evident:

the earlier in a project that potential problems can be identified, the easier it is to avoid them. If local input is not sought until the production stage, it is too late for the Secretary to use that information "in determining whether to lease."

This Court's analysis in Secretary of the Interior v. California leads directly to the conclusion that section 810 must be complied with at the lease sale stage. In that case, the Court looked first to the language of the statute, and second to the purposes of the Act. Since the word "lease" was intentionally omitted from the statute, and since the purposes of the Act could be accomplished if compliance were delayed, the Court concluded that compliance was not required at the leasing stage. Here, the word "lease"

expressly appears in the statute; here, the overall objectives of the Act are met if compliance is required at leasing.

Finally, petitioners argue that compliance with the notice and hearing requirements is not necessary unless the Secretary is certain that subsistence input will occur. This reading of the Act is illogical, inconsistent with the purposes of the Act, and not supported by law. Particularly with respect to oil and gas activities, the risks of a prcject are of critical importance. Presumably, if the Secretary were certain that a major oil spill would occur under certain circumstances, he would not permit the activity under those circumstances. The Secretary's construction of the Act might obviate the need for subsistence

analysis even at the production stage and even in the face of the risk of devastating spills, as long as the occurrence of the spills were not "certain."

The Secretary cannot ensure that "utilization of the public lands in Alaska is to cause the least adverse impact possible on ... subsistence" unless he examines all the potential ramifications of his action in the light of the impact on subsistence. Rural residents cannot have a "meaningful role" in land use decisions if the certainty, rather than the threat, of impact is required.

The Ninth Circuit's conclusion that section 810's notice and hearing requirements are triggered whenever the proposed activity "may" significantly impact subsistence is fully supported

by case law. The language in section 810 -- "[N]o such [action] which would significantly restrict subsistence uses" -- is nearly identical to NEPA's requirement of an impact statement for any "major Federal actions significantly affecting" the human environment. 42 U.S.C. § 4332(2)(C). This phrase means that the agency must show there is "no substantial possibility that [the activity] could significantly affect the quality of the human environment." Quinonez-Lopez v. Coco Lagoon Development Corp., 733 F.2d 1, 2 (1st Cir. 1984). See also, Foundation for North American Wild Sheep v. United States Dep't of Agriculture, 681 F.2d 1172, 1177-78 (9th Cir. 1982)(whether the proposed activity "may significantly degrade"); Columbia Basin Land Protection Ass'n v. Schlesinger,

643 F.2d 585, 597 (9th Cir. 1981)(same); Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1320 (8th Cir. 1974)(whether "the project could significantly affect"); Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 (5th Cir. 1973)(if "the project may cause a significant degradation"). This case law is fully applicable to section 810 because the purpose of the procedural requirements of notice and hearing is to aid in the decision making process.

CONCLUSION

The decisions of the court of appeals that section 810 applies to

Federal actions in the OCS and that compliance is required at the lease sale stage should be affirmed.

Respectfully submitted,

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